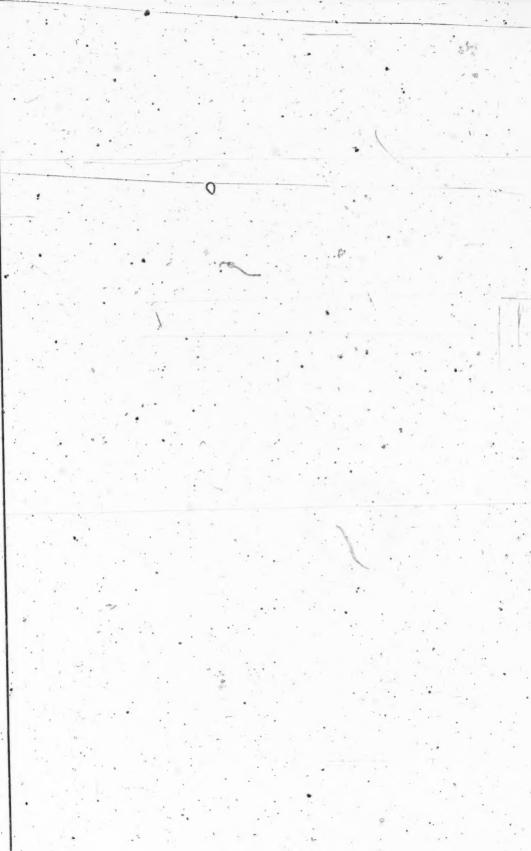
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## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

#### No. 13

### THE UNITED STATES OF AMERICA, APPELLANT,

VS.

UNITED STATES GYPSUM COMPANY, NATIONAL GYPSUM COMPANY, CERTAIN-TEED PROD-UCTS CORPORATION, ET AL.

# APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

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4	212.	Original memorandum of G. Brown dated March 1,		E970
		1928		5376
	213.	Original letter from Henning to G. Brown dated March 20, 1928	10431	5378
,	214.	Original letter from C. O. Brown to Henning dated		
		March 23, 1928	10432	5379
	215.	Original letter of Henning to C. O. Brown dated		E200
	016	March 29, 1928 Original letter from C. O. Brown to Henning dated	10435	0382
	210.	April 4, 1928		5384
	217.	Carbon copy of Exhibit 216	10437	
	218.	Original memorandum from Henley to Blagden dated	41	
		Dec. 13. 1927	10438	5388
	224.	Original letter from Avery to G. Brown dated May		5389
	005	29, 1929 Original letter from G. Brown to Avery dated June		9999
	220.	4, 1929	10440	5390
	226.	Memorandum of G. Brown dated June 4, 1929	10441	5390
	227.	Letter from Whittemore to Van Hagan dated June		
	٠.	11, 1929 and attached memorandum of C. O. Brown		****
	000	dated June 6, 1929	10442	5392 5394
	228. 230.		10440	0034
	200.	USG, dated July 3, 1929	10448	5396
	231.	Copies of memoranda from C. O. Brown dated Aug		
	٠,	9, 1929, and July 30, 1929	10453	5400
	232.	Copy of release of bond in USG v. Certain-teed dated		EADE
	004	May 22, 1929 Original memorandum from C. O. Brown to Whitte		5405
	234.	more dated Oct. 3, 1929		5407
	235.			
		5, 1929 g	10460	5409
	236.	Copy of memorandum from Henley to Coffin dated	10101	F410
	000	Dec. 3, 1929 Original letter from C. O. Brown to USG dated Jan		5410
	237.	2, 1930	10462	5411
	238.	Original letter from MacLeish to C. O. Brown dates	1	
		Jan. 18, 1930	. 10463	.5412
	241.	Original copy of USG-Certain-teed contract dated	1	
		July 1, 1932		5413
	244.	Original letter from Henning to C. C. Brown dated Sept. 24, 1934	10474	5420
_	245.			
		Aug. 14, 1934	10475	5421

	246.	Copy of letter from Van Hagan to Henning dated	riginal	Print
		*Sept. 4, 1934	10476	5422
	247.	Copy of memorandum from C. O. Brown to salesmen	10477	5423
		Copy of memorandum from C. O. Brown to salesmen		
		dated Dec. 3, 1934	10479	5425
	249.	Metallized Board Price Bulletin No. 1 (Oct. 30, 1934		
		to Jan. 24, 1940)	10480	5427
	250	Metallized Board Price Bulletin No. 2 (Oct. 30, 1934		
	200.	to Feb. 6, 1939)	10631	5607
	951	Metallized Board Price Bulletin No. 3 (Dec. 20, 1935	10001	000,
	201.	to May 13, 1939)	10697	5664
	959	Metallized Board Price Bulletin No. 4 (April 24,	10001	0004
	202.	1935 to Feb. 6, 1939) and No. 5 (Feb. 24, 1936 to		
			10790	5721
	050	Feb. 6, 1939) Metallized Board Price Bulletins—Supplements (Jan.	10129	0121
	200.		10750	FREA
	054	4, 1935 to Dec. 9, 1936)	10100	5750
	204.	Memorandum from Van Hagan to several individuals	10700	F # 00
			10793	5783
	255.	Letter from N. H. Laney to Certain-teed dated March		
	050	26, 1935, to A. W. Irwin		5784
		Letter from Irwin to Laney dated April 4, 1935		5785
		Certain-teed invoice to Pinellas dated Sept. 8, 1937		5786
٠	259.	Copy of Certain-teed invoice to Kemp-Shaw & Co.		
	3		10797	5787
	260.	Copy of Certain-teed invoice to Witt Lumber dated		~
			10798	5788
	261.	Copy of Certain-teed invoice to Morris Austin dated	3	
	14	Dec. 16, 1936	10799	5789
	262.	Copy of Certain-teed's invoice to Smith Kelly dated		
		Sept. 27, 1937	10800	5790
	263.	Copy of Certain-teed's invoice to Smith Kelly dated		4
		Aug. 17, 1937	10801	5791
	264.	Copy of Certain-teed's invoice to Smith Kelly dated		
		July 7, 1937	10802	5792
	265.	Copy of Certain-teed's invoice to Campbell Coal dated		
•	1		10803	5793
	<b>2</b> 66.	Copy of Certain-teed's invoice to Campbell Coal dated		
	p .		10804	5794
	268.	Copy of memorandum from Van Hagan to C. O.		
			10805	5795
	269.	Letter from Rahr to Spencer dated Oct. 28, 1935 and		
		carbon copy of Spencer's reply to Rahr dated	:	
		Nov. 1, 1935	10807	5796
	271.	Letter from Henley to Henning dated Aug. 25, 1931	10811	5799
	274.	Agreement dated May 7, 1930 between USG and	. 4	
			10812	5800
	275.	Agreement dated Oct. 28, 1930 between USG and Cer-		, ,
			10818	5805
Ī	276.	Agreement dated Sept. 1, 1932 between USG and	1	
		Certain-teed, and attached assignment dated July		
		14, 1933	10827	5810
	*			

9	77	Agreement dated Jan. 15, 1936 between USG and	riginal	Print	
~		Certain-teed	10839	5819	
2	78.	Copy of draft of bubble license agreement (not exe-			
		cuted) dated June 28, 1929	10850	5825	
2	79.	Original letter from Fuller to Avery dated May 24,		_	
		1927	10863	5835	
2	80.	Carbon copy of letter from Avery to Fuller dated			
	•	May 29, 1929	10865	5836	
2	81.	Original letter from Fuller to Avery dated May 31,	10000	2002	
0	00	1929 Original letter from Neale to Baker dated July 22,	10866	. 5837	
. ~	04.	1929	10867	5997	
2	83.	Original letter from Fuller to Baker dated Aug. 9,	10001	9091	
_		1929	10868	5838	
2	84.	Original letter from Neale to Baker dated Aug.			
		.29, 1929	10869	5839	
2	85.	Original letter from Neale to Henning dated May			
		2, 1932	10870	5840	
2	86.	Copy of letter from Neale to Fuller dated Mar. 30,			•
_		1933		5840	
2	87.	Original letter from Henning to Neale dated Aug. 20,		-	
		1934	10872	5841	
- 2	88.	Original letter from Henning to Neale dated Sept. 6, 1934	10072	5842	
9	20	6, 1934 Copy of letter from Fuller to Neale dated Sept. 6,	10873	9842	
	05.	1934	10874	5843	
. 2	90.	Original letter from Henning to Neale dated Nov. 30,			
	4	1984		5844	
2	91.	Copy of letter from Hallowell to Neale dated Nov.			
			10876	5844	
2	92.				
		1934	10877	5845	
2	93.	Copy of letter from Neale to Hallowell dated Dec. 5,	10000	2045	
6		1934	10878		tra.
.2	94.	Carbon copy of letter from Neale to Henning dated	10970	5846	
9	95	Dec. 10, 1934 Original letter from Sadler to Neale dated Nov. 27,	10019	9040	
-		1935	10880	-5847	
2	298.	Copy of letter from Neale to Fuller dated March 23,			
			10881	5847	
2	299.	Letter from Kling to Black dated Aug. 15, 1929		5851	
3	300.	Letter from Baker to Black dated June 23, 1934	10886	5851	
		(a) Mr. Finck's letter dated June 18, 1934 to Na-	- :		
		tional	10887	5852	
		Letter from Burley to Black dated Sept. 17, 1934	10890	5855	
2	302.	Copy of letter from Black to Burley dated Sept.		EDEP	
	) OF	18, 1934  Photostat of letter from Black to Holland (undeted)	10891		
		Photostat of letter from Black to Holland (undated) Photostat of letter dated Oct. 17, 1928 from Holland	10892	5856	-
•	,00.	to Black	10893	5856	
3	307	Letter from Black to Henning dated Oct. 16, 1930			
•		The state of the s			

				1	
	308.	Letter from Henning to Black dated Aug. 20, 1934	10895	1 rint 5858	
		Letter dated Sept. 16, 1926 from C. F. Miller to J. B.			
	911	Davis Letter from J. B. Davis to C. F. Miller dated Sept.	10897	5859	
		26, 1926  Letter from G. M. Brown to Avery dated June 10,		5858	
	312.	Letter from G. M. Brown to Avery dated June 10, 1929	10899	5861	
	313.	Memorandum from Henley to Whittemore dated	7		
		March 13, 1936	10900	5862	
	314.	Memorandum from Henley to Whittemore dated Mar.	d		
		25, 1936	10904	5868	
	315.	Memorandum from Henley to Whittemore dated Mar.			
		23, 1936	10906	5870	
		Letter from Henley to Keady dated Oct. 26, 1938		5872	
	317.	Letter dated May 15, 1929, from G. M. Brown to	10908	5979	
*	218.	Avery Telegram dated May 18, 1929, from Avery to G. M.		9019	
	. 10.	Brown	***	5873	4
	321.	Copy of memorandum from Nelson to G. M. Brown		4010	
	7.	dated Feb. 23, 1928		5874	
	322.	Copy of memorandum of Nelson dated March 2, 1928	10911	5874	
	323.	Bill of complaint in USG v. Beaver	10912	5876	
	324.	Certain-teed's answer in USG v. Beaver		5916	
	325.	Order granting temporary injunction in USG v. Bea-	÷.		
		ver	10998	5951	
	326.	- Francisco Contraction of the C		2.4.	
		bond	11001	5952	
	327.	Order dismissing USG v. Beaver			
	328.	Report to stockholders, 1925 USG Annual Report		5954	
	329. 330.	Report to stockholders, 1926 USG Annual Report Report to stockholders, 1927 USG Annual Report		5962 5970	
e	331.	Report to stockholders, 1927 USG Annual Report		5978	
	332.	USG Annual Report, 1929		5986	9
	333.	Carbon copy of memorandum from Mr. Baumhogger		0300	
	000.	to Management Board dated May 10, 1938		5993	
	334.				
•		Baumhogger dated May 16, 1938		5999	
	335.	Carbon copy of memorandum from Henley to Baum-			
		hogger dated July 11, 1938		6002	
	336.	Original invoice of Oakfield to Quality Materials			
		dated May 21, 1938	11074	6003	
	357.	Original invoice on board of Oakfield to Cox dated June 16, 1938	11000	2004	
	220	Original invoice on board of Oakfield to Cox dated		6004	
	000.	June 20, 1938		6005	
	339.	Original letter dated May 17, 1932, from Miller to	11010	0000	
	,	Baker		6006	
	340.			-50.5	
		May. 25, 1922		6007	
	341	Original memorandum from Burley to Higgins dated			
		May 25, 1932	11079	6008	
		· ·			

	· · · · · · · · · · · · · · · · · · ·	riginal	Print	
343.	Photostat of letter from Baker to Miller dated, May	11000	****	
245	24, 1932 Original of follow-up letter from Burley to Fairmont	11080	6008	
040.	dated Sept. 20, 1927	11089	6016	
346.	Original of follow-up letter from National to Fair-			
347.	mont <sup>3</sup> 2ted Oct. 12, 1927 Original letter from Baker to Spease dated Sept. 27,		6017	
041.	1929	11093	6018	
348.	Carbon copy of letter from Fairmont to Baker dated			
0.40		11094	6019	
349.	Original letter from Baker to Spease dated Oct. 7, 1929	11095	6020	
350.	and the same of th			
051	Jan. 11, 1930 Original letter from Baker to Spease dated Jan. 22,	11096	6020	
351.	1930	11097	6021	
352.	Original letter from Baker to Spease dated April 3,			4
	1930	11098	6021	
353.	Handwritten copy of telegram from Spease to Baker		2000	8
254	dated April 7, 1930 Handwritten copy of telegram from Baker to Spease	11099	6022	
001.		11100	6022	
355.	Original letter from Baker to Spease dated May 23,		•	
070	1930	11101	6023	
300.	Original letter from Hanson to Fairmont dated April 24, 1933	11102	6024	
357.	Original copy of Fairmont-Oakfield contract dated	. *		
	Dec. 17, 1933	11103	6025	
359.	Original letter from Eldred to Spease dated April 27, 1935	11106	6027	
360.	Carbon copy of letter from Spease to Baker dated		0021	
	July 23, 1938		6028	
361.	Original letter from Baker to Spease dated July 26,			
	1938	11108	6029	2
	USG-Newark-Keily agreement dated April 29, 1937 Original assignment from Kelley to Newark dated			
000.		11113	6032	
364.	Original agreement between USG and Newark dated			
	Jan. 3, 1939	11116	6034	
365.	Original copy of consent to sell Calvin Tomkins dated Jan. 3, 1939		6037	
366.	Carbon copy of letter from Wileman to USG dated			
	July 8, 1937	11121	6038	
	(a) Carbon copy of letter from USG to Tomkins dated July 16, 1937	11122	6038	
367.	Carbon copy of letter from USG to Tomkins dated		· ·	2
	Julý 14, 1937	11123	6039	
368.	Carbon copy of letter from Tomkins to Keady dated	11104	6040	
	July 21, 1937  (a) Carbon copy of letter from USG to Tomkins dated	11124	0040	
		11125	6040	

*			****
		riginal	Print
369.	Original letter from Tomkins to Keady dated Sept. 23, 1938		6041
	(a) Original letter from Tomkins to Keady dated Sept. 23, 1938		
•	(b) Kelley royalty free perforated lath license dated Sept. 16, 1938	11128	6043
370.	Original letter from Keady to Kelley dated Oct. 3, 1938	11130	6045
	(a) Carbon copy of letter from USG to Kelley dated Oct. 3, 1938	11131	6046
	Original letter from Kelley to Henning dated Sept. 21, 1936	11132	6047
		11133	6047
373.	Carbon copy of letter from Wileman to Structural dated June 7, 1937 Carbon copy of letter from Wileman to Oakfield dated	11134	6048
		11135	6049
. 375.	dated Sept. 27, 1937  (a) Kelley shipping memo dated Sept. 27, 1937 on	11136	6050
	United Clay order  (b) Kelley shipping memo dated Sept. 27, 1937 on	11137	6050
	United Clay order (c) Original Kelley invoice to Oakfield dated Sept.	11138	
, 2 a	27, 1937 on United Clay order (d) Oakfield order to Kelley dated Sept. 27, 1937 on		6051
376.	United Clay order Kelley office voucher on United Clay order dated		
	Dec. 10, 1937  (a) Kelley shipping memo (undated) on United Clay		6053
	order (b) Kelley shipping memo dated Dec. 10, 1937 on United Clay order		6053
* 4	(c) Kelley invoice to Oakfield dated Dec. 10, 1937 on		6054
377.	Kelley office voucher on Robinson & Sons order dated		
_	(a) Kelley shipping memo dated Nov. 18, 1937 on Robinson & Sons order	11146	6055
	(b) Oakfield order to Kelley dated Nov. 9, 1937 on Robinson & Sons order	11147	6056
	(c) Kelley shipping memo dated Nov. 18, 1937 on Robinson & Sons order	11148	6086
non vila	(d) Bill of lading dated Nov. 18, 1937 on Robinson & Sons order  (e) Kelley invoice to Oakfield dated Nov. 18, 1937 on	11149	6057
378.	Robinson & Sons order Kelley office voucher on United Clay order dated Oct.	11150	6060
	14, 1937	11151	6061

-		Original	Print
	(a) Telegram from Oakfield to Kelley order ship- ment dated Oct. 13, 1937		
	(b) Kelley shipping memo dated Oct. 14, 1937 on		0002
	United Clay order (c) Kelley invoice to Oakfield dated Oct. 14, 1937 on	11153	6062
	United Clay order		6063
379.	Kelley invoice to Oakfield dated April 16, 1937	11155	6064
	(a) Kelley office voucher on Robinson & Sons order		
-	dated April 16, 1937 (b) Kelley shipping memo dated April 16, 1937 on	11156	6065
	Robinson & Sons order		6065
35	(c) Kelley shipping memo dated April 16, 1937 on		
	Robinson & Sons order	11157	6066
	(d) Kelley shipping memo (undated) on Robinson & Sons order		6066
43	(e) Oakfield order to Kelley dated April 16, 1937 on	11100	0000
	Robinson & Sons order	11159	6066
380.	Carbon copy of letter from Tomkins to Eldred dated		
001	Nov. 17, 1937	11160	6067
381.	Original letter from Bartlett to Tomkins dated Dec. 27, 1937		6068
382.	Original Board Survey complaint re Oakfield dated	11101	0000
	Dec, 27, 1937	11162	6069
383.	Carbon copy of letter from Tomkins Deldred dated		
384	Dec. 29, 1937 Original letter from Eldred to Tomkins dated Dec.	11163	6070
004.	30, 1937		6071
385.	Original report from Tomkins to Board Survey dated		
	Jan. 3, 1938	11166	6072
386.	Carbon copy of letter from Tomkins to Eldred dated Jan. 3, 1938	11167	6079
387.	Original letter from Bartlett to Tomkins dated May	•	0013
	17, 1938	11168	6074
388.	Carbon copy of letter from Tomkins to Bartlett dated		
900	May 20, 1938 Original letter from Kelley to Board Survey dated	11169	6075
009.	July 11, 1932	11170	6076
390.	Carbon copy of letter from Miller to Kelley dated		
		11171	6077
391.	Original letter from Kelley to Henning dated June 1,		6070
392.	Original letter from Kelley to Board Survey dated	11172	6078
	May 23, 1932	11174	6079
	Carbon copy of letter from Board Survey to Kelley		
	dated May 17, 1932		6080
394.	Carbon copy of letter from Board Survey to Henley dated May 9, 1932		6081
395.	Original letter from Henley to Miller dated May 2,	11,10	0001
	1932	11177	6082
396.	Carbon copy of letter from Miller to Kelley dated		
	March 22, 1932	11178	6083

0		Driginal	Print	
397	Original letter from Baker to Miller dated March 21, 1932	11179	6084	
398	Original letter from Pellet to Board Survey dated Oct. 25, 1933	11180	6085	
399	. Carbon copy of letter from Board Survey to Pellet dated Nov. 7, 1933	11181	6086	
400	Carbon copy of letter from Newark to Ebsary dated Jan. 20, 1937	11182	6087	
403	. Original letter from Stromquist to Burley dated Jan.	11183	6088	1
404	Original letter from Henning to Lenci dated May 23,	11185	6090	
405	Carbon copy of letter from Lenci to Niel dated May 28, 1929	11188	6094	
* :	May 23, 1929	11189	6095	
	Carbon copy of letter from Lenci to Niel dated May 24, 1929	11190-	6096	
	Original letter from Henning to Lenci dated May 24, 1929	11191	6097	
	Original letter from Henning to Lenci dated May 25, 1929	11192	6098	
	Original letter from Henning to Lenci dated June 7, 1929	11193	6099	*
	Original letter from Henning to Lenci dated June 19, 1929	11195	6101	
	Original letter from Henning to Lenci dated June 19,	11196	6102	
413	Original letter from Henning to Lenci dated June 26, 1929  Original letter from Henning to Lenci dated July 9,	11199	6104	
	1929  Original letter from Henning to Lenci dated July 24,	11201	6106	
	1929  Original letter from Henning to Lenci dated July 25,	11205	6110	
	1929  Original letter from Henning to Lenci dated July 26,	11207	6112	
	1929 Original letter from Henning to Lenci dated Aug. 3,	11210	6116	
420	1929	11211	6117	1
421	June 21, 1929  Carbon copy of letter from Lenci to USG dated June	11213	1.	
422	21, 1929 Original letter from MacLeish to Ebsary dated July		6120	
423	the contract of the contract o			
424	July 17, 1929  Original letter from Henning to Lenci dated April 5,		1	
	1930	11217	0122	_

	0	riginal	Print
1.	Original letter from Henning to Lenci dated April 15, 1930	11219	
426.	Original letter from Henning to Ebsary dated June 3,	11220	
427.	Original letter from Henning to Ebsary dated Feb,	7.	
428.	Carbon copy of letter from Lenci to Henning dated	11221	6126
	Jan. 20, 1930 (a) Original letter from Henning to Lenci dated Jan.		6127
429.	22, 1930 Carbon copy of letter from Lenci to Henning dated	11224	6128
430.	Feb. 13, 1930 Original letter from Henning to Ebsary dated Aug.	11225	6129
	0 1000	11226	6130
	Sept. 22, 1930 Original letter from Henning to Ebsary dated March	11227	6131
433.	4, 1932	11228	6132
	1934	11229	6133
	Original letter from Henning to Ebsary dated Dec. 3, 1934	1230	6134
	Duplicate original of letter from Henning to Ebsary dated Oct. 29, 1935	1231	6135
436.	Handwritten copy of letter from Ehrlicher to Hough dated April 20, 1932	11232	6136
437.	(a) Typewritten copy of Ex. 436	11234	
438.	1932	11235	6138
-		1236	6139
>	1932	1237	6141
	Carbon copy of letter from Lenci to Henning dated June 9, 1932	1238	6142
		1240	6143
1	Carbon copy of letter from Lenci to Henning dated July 16, 1932	1242	6145
443.	Carbon copy of letter from Lenci to Henning dated July 26, 1932	1241	6144
444.	Original letter from Henning to Lenci dated Aug. 1, 1932	1245	6147
445.	Carbon copy of letter from Lenci to Ebsary dated	1246	
446.		1	
447.	Carbon copy of letter from Lenci to Board Survey dated May 16, 1932		
448.	Copy of letter from Henning to Lenci dated May 17.		
	19321	1249	6150

				xxi	
		.00	riginal	Print	
	449.	Carbon copy of letter from Lenci to Henning dated			
		June 17, 1932	11251	6151	
	450	Original letter from Miller to Lenci dated June 25,		11	
	400.	1932	11252	6152	
	451	Original letter from Miller to Lenci dated Aug. 18,			
	451.		11253	6153	
			11200	0100	
	452.	Carbon copy of letter from Lenci to Henning dated	11054	6154	
		May 26, 1932	11254	0104	
	453.	Carbon copy of letter from Lenci to Board Survey-			
		dated May 31, 1932 Original letter from Hough to Lenci dated June 9,	11255	9199	
	454.	Original letter from Hough to Lenci dated June 9,			٠
		1932	11256	6156	
	455.	Carbon copy of letter from Lenci to Board Survey			
		dated June 11, 1932	11257	6157	
	456.	Carbon copy of letter from Lenci to Board Survey			
		dated June 21, 1932	11258	6158	•
	457.	Original letter from Miller to Lenci dated June 23,	11050	2150	
	- 2	1932 Original letter from Miller to Lenci dated Sept. 21,	11209	6159	
	458.	Original letter from Miller to Lenci dated Sept. 21,	11000	6160	
	/	1932 Original letter from Lenci to Board Survey dated	11200	0700	
	459.	Sept. 24, 1932	11961	6161	
	400	Sept. 24, 1932	11201	0101	
	460.	Carbon copy of letter from Henning to Lenci dated. Sept. 27, 1932	11262	6162	
	461	Original letter from Lenci to Henning dated Dec.		0102	
	401.	6, 1932	11263	6163	
	469	Carbon copy of letter from Henning to Ebsary dated	4-2-00		
	402.		11264	6164	*
	463	Original letter from Miller to Lenci dated May 8, 1933	11265	6165	
	464.	Original letter from Miller to Lenci dated May 11,			
		1933	11266	6166	
	465.	Original letter from Miller to Lenci dated May 29,			
		1983	11267	6167	
	466.	Original letter from Miller to Lenci May 31, 1933	11268	6168	-
	467.	Original letter from Lenci to Board Survey dated			
1	1.	June 13, 1933	11269	6169	
	468.				
	./	dated built 10, 1000	11270	6169	
	469.	Original letter from Miller to Lenci dated June 15,		2.27	
		1 2000		6171	3
	470.	Original letter from Diegel to Lenci dated Nov. 21,			
		1932	11272	6172	
	471.	Carbon copy of letter from Lenci to Board Survey	***		
*		dated Nov. 28, 1932	11273	6173	
	472.	Original letter from Henning to Lenci dated July 29,	11074	está	
		1929 /	11274	6174	
	473.	Original letter from Henning to Lenci dated March	11275	6174	1
	474	26, 1930 Original letter from Henning to Lenci dated March 4,		0114	
	474.	Original letter from Benning to Lenci dated March 4,	11276	6175	1
		1931		/	1
			* 2		

		Original	Print	
475.	Original letter from Henning to Lenci dated June 4,			
476.	Original letter from Henning to Lenci dated Feb. 7,	11277	6176	
		11278	6176	
480.	Carbon copy of letter Lenci to Henning, Dec. 7, 1932	11279	6177	
*	Carbon copy of letter from Lenci to Diegel dated Dec.			
482.	19, 1932 Carbon copy of letter from Lenci to Board Survey	11280	6178	
	dated Feb. 16, 1933		6178	
483.	Original memo from Diegel to Lenei dated March 3, 1933			
484.	Carbon copy of letter from Lenci to Board Survey	1	0110	
	dated March 24, 1933		6180	
485.	Original letter from Miller to Ebsary dated March 28,			
	1933	11284	6181	
486.	Original letter from Lenci to Board Survey dated			
	April 13, 1933	11285	6182	
487.	Carbon copy of letter from Miller to Lenci dated April 17, 1933		0100	
489.		11200	6183	
	1933	11287	6184	
490.	Original letter from Diegel to Lenci dated April 10,		6185	
491.	Carbon copy of letter from Lenci to Board Survey dated April 12, 1933		1	
492.	Original letter from Miller to Lenci dated April 14,	110	6186	
400	1933		6187	
493.	dated April 20, 1933	11291	6188	,
494.	Original letter from Miller to Lenci dated June 15, 1933	2 21	6189	
495.	Original letter from Lenci to Board Survey dated			
400	June 20, 1933	11293	6190	
450.	June 13, 1933		6191	
497.	Carbon copy of letter from Miller to Lenci dated June		/	
,	15, 1933		6192	
498.	. Original letter from Lenci to Board Survey dated June	11 7		
	/ 20, 1933	11296	6193	
499.	Carbon copy of memo from Sadler to Miller dated			
E00		11297	6194	
		11298	6195	
501.	Original letter from Lenci to Board Survey dated			
Eng	May 3, 1934  Copy of telegram from Ebsary to Henning dated Nov.	11299	6196	
	8, 1934		6197	
	(a) Memo of Diegel attached to Ex. 502	11301	6197	
503.				
	1932		6198	

1		riginal	Print
504.	Original letter from Neal to Lenci dated March 30, 1933	11303	6199
505	Carbon copy of letter from Ebsary to Henning dated		. 0100
	April 12, 1933		6200
	Original letter from Miller to Ebsary dated April 17, 1933	11305	6201
508.	Original letter from Miller to Lenci dated May 8, 1933	11396	6202
509.	Original letter from Neal to Lenci dated May 17,	11307	6204
		11308	6205
511.	Carbon copy of letter from Lenci to Board Survey dated June 1, 1933.	11310	6206
512.	Original letter from Lenci to Henning dated March		
513.	Original letter from Price to Ebsary dated May 9, 1936		1.1
	(a) Lenci complaint on Delaware Clay Products dated April 1, 1936	-0	6208
514.	Copy of Kelley explanation dated May 1, 1936 with respect to Delaware Clay Products matter (enclosed with Ex. 513)		6209
515.	Original of Kelley explanation dated May 1, 1936		6210
	Original letter from Henning to Lenci dated Sept.	11316	6211
517.	Carbon copy of letter from Lenci to Henning dated		6212
518.	Original letter from Henning to Lenci dated Sept. 18, 1936		6213
519.	Original letter from Blanchfield to Lenci dated July	11319	6214
520.	Carbon copy of letter from Lenci to USG dated July 22, 1938		
521:	Carbon copy of letter from Lenci to USG dated Aug.	11321	W. 4
522.	Carbon copy of letter from Lenci to USG dated Sept.		6216
523.	Original letter from Sensibar to Ebsary dated July 31, 1939		
524.	Carbon copy of letter from Lenci to Cardiff dated Aug. 3, 1939		
525.	Original letter from Cardiff to Lenci dated Aug. 3, 1939	11325	
526.	Carbon copy of letter from Lenci to Cardiff dated Aug. 10, 1939	11326	
527	Carbon copy of letter from Lenci to Cardiff dated		
528.	Sept. 18, 1939 Original letter from Gutman to Lenci and enclosure	11327	
	dated Sept. 18, 1939	11328	6222

			And and man h	Samt on a	٠
	529.	Carbon copy of letter from Lenci to USG dated Sept.	Priginal		0
	530.	28, 1939 Original letter from Gutman to Lenci dated Sept.	11330	6224	
		29, 1939 Copy of telegram from Ebsary to USG dated Oct.	11331	6225	1
	551.	3, 1939	11333	6226	
	532.	Original letter from Bartlett to Lenci dated Oct. 3, 1939	11334	6227	
		Original memo from Allen to Sales Department dated			
	534.	Oct. 7, 1939 Copy of telegram from Ebsary to USG dated Oct.		6227	
	. 5	11, 1939	11336	6228	
	<b>D3D.</b>	Original letter from Bartlett to Ebsary dated Oct, 12, 1939.	11337	6228	
	536.	Carbon copy of letter from Lenci to Cardiff dated		0220	
	*	Oct. 13, 1939	11338	6229	
	537.	Original letter from Gutman to Lenci dated Oct. 14, 1939	11930	6230	
	538.	Carbon copy of letter from Lenci to Bartlett dated	11000	0200	
		Oct. 16, 1939	11340	6231	1
		Carbon copy of letter from Lenci to Cardiff dated Oct.  16, 1939	11341	6232	
	540.	Original letter from Gutman to Lenci dated Oct. 17.			
	E41 .	1939	11342	6233	
		Carbon copy of letter from Lenci to Cardiff dated Oct. 21, 1939		6234	
	542.	Original telegram from USG to Ebsary dated Oct. 21,			
	543.	1939 :	11344	6235	
	0	25, 1939	11345	6235	
	544.	and the same and t	11946	6235	100
	545.	8, 1935 Carbon copy of telegram from Henning to Ebsary		0230	
		dated Nov. 8, 1935	11347	6236	
	546.	Original letter from Henning to Ebsary dated Nov.			
	547	8, 1935 Original letter from Henning to Lenci dated Aug.	11348	6237	
		20, 1934		6238	
	548.	Original letter from Burley to Lenci dated April 1,			
		1935 and enclosed copy of letter from Burley to Diegel dated March 18, 1935	11350	6239	
	549.	Original letter from Carey to Lenci dated Dec. 28,			4.
	01	1934	11355	6243	
		Original letter from Carey to Black dated Dec. 28, 1934	11352	6241	
	553.	Original letter from Carey to Lenci dated Dec. 31,			4
	554.	1934 Original letter from Carey to Black dated Dec. 31,	11358	6245	
	004:	1934		6246	
	555.	Original letter from Carey to Lenci dated Dec. 31,			
6		1934	11360	6247	

			riginal	Drine
	556.	Original letter from Carey to Black dated Dec. 31,	11361	
	558.	Copy of letter from Carey to Lenci dated May 10, 1935		6249
	562.	Original letter from Lenci to Paragon of Syracuse dated July 31, 1929		
	571.			
	572.	Carbon copy of telegram from Sensibar to American		
	572	dated Aug. 25, 1933 Original telegram from American to Sensibar dated		6254
	010.	Aug. 25, 1933 Original letter from Black to Sensibar dated Sept.	11369	6254
	574.	Original letter from Black to Sensibar dated Sept. 21, 1933	11370	6255
	575.	Carbon copy of telegram from Sensibar to American		0200
		dated Oct. 3, 1933 Original letter from Sensibar to Black dated Feb.		6255
		1, 1936	11372	6256
	577.	Carbon copy of letter from Black to Sensibar dated		COET
	578 +	Feb. 10, 1936 Original letter from Baker to Sensibar dated Oct.	11373	6257
	010.	24, 1938		6258
	584.	Carbon copy of letter from Cardiff to Lenci dated		
	585.	Oct. 4, 1939 Original letter from Hough to Cardiff dated Oct. 5,	11375.	6259
		1939	11376	6260
	591	Kelley price list dated April 26, 1932	11377	6261
		Kelley price list dated January 1938		6271
	593.	Kelley price list dated March 1, 1937	11394	6279
		Sadler complaint against Kelley on Stremble's ac-		
		tivities dated June 5, 1936	11397	6283
	595.	Carbon copy of letter from Mahin to Kelley dated		
		June 8, 1936	11398	6284
	596.	Carbon copy of letter from Mahin to USG dated	1	
		July 16, 1936	11399	6285
0		(a) Kelley form of answer to Stremble complaint		
	E07	dated June 22, 1936	11400	6286
	597.	Carbon copy of letter from McCormack to Stremble	11101	0007
	500	dated June 20, 1938	11401	6287
		Structural price list dated Sept. 14, 1936 Texas-USG license dated April 11, 1927		
	000.			6289
	601.	Original letter from Spencer to Certain-teed dated	11415	6299
	602.	Original letter from Spencer to Straub dated Dec.	11419	0303
	000		11424	6307
		Original letter from Chism to USG dated March 16, 1939	11431	6312
	604.	Original letter from Knode to Moylan of Schumacher		
	005		11432	6313
	605.	Makowski patent No. 1,349,778	11436	6317
		· · · · · · · · · · · · · · · · · · ·		

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	609.	Original letter from Stromquist to Paragon dated	Print	40
		June 3, 1929	6324	
		(a) Two Universal sales bulletins enclosed with Ex.		-
		60911446	6326	
	610	Report of Bureau of Standards on test of Schumacher		
		perforated lath 11448	6328	
	611.	Report of Bureau of Standards on test of National		
		perforated lath 11464	6345	
	612.	Certain answers to interrogatories addressed to USG 11479	6362	
		Certain answers to interrogatories addressed to Na-	C0.00	
	014	tional 11484 Certain answers to interrogatories addressed to Cer-	6369	
	014.		0071	
	615	tain-teed 11487	6371	-
	010.	Certain answers to interrogatories addressed to Eb-	COTE.	
٤.	616	USG report of Sales Department 1926 11494	6375	
		USG report of Sales Department 1926  USG report of Sales Department first quarter 1927 11499	6380	
		USG report of Sales Department first quarter 1927 11499 USG report of Sales Department first half 1927 11509		
		USG report of Sales Department 1927 11509 USG report of Sales Department 1927 11515		
		USG report of Sales Department first half 1928 11521	6409	
		USG report of Sales Department first quarter 1929 11526	.0410	
	624.	Certain-teed royalty statement signed by Krug dated August 20, 1929	6419	
	625.	Certain-teed royalty statement signed by Krug dated .		
		Sept. 17, 1929	6421	
	626.	Certain-teed royalty statement signed by Krug Oct.		
		21, 1929	6423	
	627.	Certain-teed royalty statement signed by Krug Nov.		
3			6425	
	628.	Certain-teed royalty statement signed by Krug dated		
		Dec. 20, 1929 11533	6427	
	629.			
		Jan. 20, 1930	6429	
	630.	Certain-teed royalty statement signed by Krug dated		
	4	March 3, 1930	6431	
	631.	Certain-teed royalty statement signed by Krug dated		
		March 15, 1930	6433	
	632.	Certain-teed royalty statement signed by Krug dated		
		April 16, 1930	6435	
	633.	Certain-teed royalty statement signed by Krug dated		-
		May 14, 1930	6437	
	634.	Certain-teed royalty statement signed by Krug dated		
	*	June 17, 1930 11539	6439	
	635.	Certain-teed royalty statement signed by Krug dated	4	
	* *	July 15, 1930 11540	6441	
	636.	Certain-teed royalty statement signed by Krug dated		
	,	Aug. 14, 1930 11541	6443.	
	637.	Certain-teed royalty statement signed by Krug dated	1	
		Sept. 15, 1930 11542	6445	
	638.	Certain-teed royalty statement signed by Krug dated		
		Oct. 18, 1930	6447	

	3		
	3	: 4,	xxvii
C20	Certain-teed royalty statement signed by Krug dated	riginal	Print
-039.	Nov. 14, 1930	11544	6449
640	Certain-teed royalty statement signed by Krug dated		-
040.	Feb. 17, 1931	11545	6451
641	Small sample of Speer board and strip of Bestwall		
	advertising material attached thereto	11546	6453
642.	Speer Patent No. 1,790,252	11547	6454
		11553	6459
	Original contract between Speer and Certain-teed		
.044.	dated June 4, 1930	11582	6488
693.	Original letter from Baker to Henning dated Sept.		
	11, 1931	11585	6492
694.			
00.0	March 22, 1935		6493
695.	Carbon copy of letter from Burley to Lenci dated	11587	6494
696	Aug. 27, 1935 Original letter from Burley to Biesinger dated Oct. 7,		0434
0.00.	1935		6495
697:	Carbon copy of letter from Burley to Krumholz dated		
	Oct. 24, 1935	11589	6496
699.	Original letter from Burley to Board Survey dated		
	June 25, 1932		6497
700.	Carbon copy of letter from Board Survey to Burley		6498
701	dated July 2, 1932 Original letter from Burley to Board Survey dated	11001	0430
	July 12, 1932	11592	6499
702.	Carbon copy of letter from Board Survey to Burley		
	dated Aug. 9, 1932		6500
703.	Original letter from Burley to Board Survey dated		
	Sept. 17, 1932	11594	6501
704.	Original letter from Burley to Board Survey dated	11505	6502
705	Sept. 26, 1932 Carbon copy of letter from Board Survey to Burley	11000	0002
	dated Sept. 27, 1932		6503
706.			
	Oct. 4, 1932	11597	6504
707.	Carbon copy of letter from Board Survey to Burley		
700	dated Oct. 8, 1932	11598	6505
708.	Original letter from Burley to Board Survey dated June 2, 1933		6506
709.	Carbon copy of letter from Board Survey to Burley		0300
,	dated June 3, 1933	11600	6507
710.	Original letter from Burley to Board Survey dated		
	July 11, 1933		6508
711.	the state of the s	*****	0500
719	dated July 29, 1933	11603	6509
112.	Carbon copy of letter from Burley to Board Survey dated Jan. 5, 1935	11604	6510
713.	Original letter from Biesinger to Board Survey dated		*
	Feb. 19, 1936	11605	6511

		riginal	Drint
714.	Original letter from Certain-teed to National dated	11606	
		11000	0012
	(a) Original letter from Certain-teed to National		
			6514
	(b) Original Certain-teed-National agreement dated	*	7
	Dec. 17, 1930 enclosed in Ex. 714a		6515
716.	Original telegram from Baker to Avery dated May		
	17, 1929	11619	6591
			6521
717.	Original letter from Baker to Avery dated June		
	20, 1929	11614	6521
718.	Original letter from Baker to Avery dated Nov.		
	2, 1931	11615	6522
719.	Original letter from Carey to Black dated May		
¥	10, 1935		6523
720.	Copy of telegram from Avery to Gloyd dated May		
		11617	6524
791	Copy of telegram from Avery to Gloyd dated May	*****	0024
	18. 1929	11618	6524
799	Original telegram from Gloyd to Avery dated May	11010	0024
.122.		11010	CEO.
700		11619	6524
123.	Carbon copy of letter from Avery to Gloyd dated May 20, 1929	11620	6525
794	Copy of telegram from Avery to Ebsary dated May-	75 25 25 25	0020
124.			eroe
TOF	18, 1929	11621	6526
725.	Copy of telegram from Avery to Baker dated May	11000	
	18, 1929	11622	6526
726.	Copy of telegram from MacLeish to Baker dated		
		11623	6527
727.	Copy of letter from Sadler to Miller dated June 13,	* *	
	1933	11624	6527
729.	Carbon copy of letter from Board Survey to C. O.		
	Brown dated Nov. 14, 1932		6528
730.	Original letter from Henley to Board Survey dated		
	Nov. 28, 1932	11626	6529
·731.	Carbon copy of letter from Board Survey to C. O.		
4	Brown dated May 13, 1933	11627	6530
732.	Original letter from Henley to Board Survey dated		
	May 25, 1933	11628	6531
733.	Carbon copy of letter from Board Survey to C. O.		
	Brown dated Aug. 2, 1933	11629	6532
734.	Original letter from Henley to Board Survey dated		9 1
		11630	6533
735.	Carbon copy of letter from Board Survey to C. O.		0000
.00.	Brown dated Aug. 3, 1933	11631	6534
736.	Original letter from Henley to Board Survey dated		3004
100.	Aug. 18, 1933	11632	6535
797	Carbon copy of letter from Board Survey to C. O.	11002	0000
131.	Brown dated Aug. 3, 1933	11699	6596
700		11633	6536
738.		11001	0500
	Aug. 18, 1933	11634	6537

	. 0	riginal	d'rint
739.	Carbon copy of letter from Board Survey to Henley dated Aug. 19, 1932	11635	
740.	Carbon copy of letter from Sadler to Miller dated Aug. 15, 1932		6539
741:	Original letter from Henley to Miller dated Aug. 29, 1932	11637	6540
742.	Carbon copy of letter from Board Survey to C. O. Brown dated Aug. 23, 1932	11638	6541
743.	Original letter from Henley to Board Survey dated Sept. 8, 1932		6542
744.	Original letter from Henley to Board Survey dated		11
745.	Carbon copy of letter from Board Survey to C. O. Brown dated March 16, 1934		6545
	Carbon copy of letter from Board Survey to Henley dated April 24, 1934	11641	6544
		11643	6546
749.	Carbon copy of letter from Board Survey to C. O. Brown dated July 19, 1934	11344	6547
	Original letter from Henley to Board Survey dated July 31, 1934 Original Certain-teed form of answer to Board Sur-		6548
	vey dated Sept. 13, 1935 Copy of USG form of complaint to Board Survey	11646	6549
	dated Sept. 3, 1935 Copy of Board Survey form of complaint to Certain-	11647	6550
	teed dated Sept. 3, 1935 Carbon copy of letter from Board Survey to Baker		6551
754.	dated April 13, 1932 Original letter from Henley to Board Survey dated		6552
755.	April 5, 1932 Carbon copy of letter from Board Survey to Baker		6553
756.			6554
757.	Aug. 10, 1932 Original letter from Baker to Board Survey dated Aug. 23, 1932		6556
758.	Original letter from Henley to Board Survey dated Oct. 13, 1932		6557
 	Carbon copy of letter from Board Survey to Burley dated Oct. 31, .1932	11655	6558
	Carbon copy of letter from Board Survey to Baker dated Dec. 20, 1932	11656	6559
761.	and the state of t	11657	6560
	15, 1933 Carbon copy of letter from Board Survey to National	11658	6561
		11659	6569

		riginal	Print
	Original letter from Burley to Miller dated May	11660	
765.	Copy of letter from Sadler to Miller, dated April		6564
766.	Carbon copy of letter from Board Survey to National		
76.7.	Original letter from Burley to Board Survey dated		
768.	Aug. 9, 1933 Original USG form of complaint to Board Survey		
769.	dated June 23, 1936 Original letter from Burley to Scott, MacLeish &		6566
1.	Falk dated Nov. 11, 1936  Carbon copy of letter from Board Survey to Cer-		6567
1:	tain-teed dated May 21, 1935		6568
771.	June 11, 1935	11667	6569
772.	Carbon copy of letter from Board Survey to Certain- teed dated June 14, 1935		6570
773.	Original letter from Henley to Board Survey dated June 19, 1935		6571
774.	Original USG form of complaint to Board Survey dated June 22, 1936		6572
775.	Carbon copy of letter from Mahin to Certain-teed		
776.	dated July 16, 1936 Copy of Certain-teed form of reply to Board Survey	7	6574
777.	dated July 29, 1936	1	6575
778.	dated May 17, 1933 Original letter from Burley to Board Survey dated	11673	6576
779.	May 22, 1933 Original letter from Burley to Board Survey dated	11674	6577
	Oct. 31, 1932 Carbon copy of letter from Board Survey to Uni-	11675	6578
	versal dated Nov. 21, 1932		6579
	Copy of letter from Sadler to Miller dated July 20, 1933	11677	6580
782.	Carbon copy of letter from Board Survey to National dated July 29, 1933	11678	6580
783.	Original letter from Burley to Board Survey dated Aug. 9, 1933		6581
784.	Carbon copy of letter from Board Survey to Burley dated Sept. 12, 1933	11680	6582
785.	Copy of letter from Sadler to Gallagher dated July 24, 1933	11681	6583
	••••	22304	

#### In the District Court of the United States For the District of Columbia

Civil Action No. 8017
[File Endorsement Omitted.]

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS

#### Complaint .

#### Filed Aug. 15, 1940

The United States of America, seeking equitable relief, by its attorneys, acting under the direction of the Attorney General, complains and alleges, on information and belief, as follows:

#### JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted against the above-named defendants under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," said act being commonly known as the "Sherman Antitrust Act," in order to prevent continued violations by said defendants, jointly and severally, as hereinafter alleged, of Section 1 of the Sherman Antitrust Act, as amended by the Act of August 17, 1937, and of Sections 2 and 3 of said Act.

2. Each of the defendant companies, except Texas Cement Plaster Company, transacts business in the District of Columbia. Said companies are engaged in a continuous course of business in selling and delivering gypsum products, including gypsum board and plaster, to dealers and consumers within the District of Columbia. Said companies are engaged in soliciting through salesmen orders for said gypsum products from dealers and consumers within the District of Columbia and in promoting the sale of said gypsum products in the District of Columbia by adver-

tising in the District of Columbia and by distributing price lists, bulletins, and circular among dealers and consumers

within the District of Columbia.

3. The defendants United States Gypsum Company and The Celotex Corporation may be found within the District of Columbia. Each of said companies maintains sales offices, warehouses, and duly authorized agents within the District of Columbia for the transaction of the aforesaid business in said gypsum products.

4. The unlawful combination, conspiracy, and monopoly hereinafter described has been, and is being, carried out and made effective in part within the District of Columbia and many acts in furtherance of said combination, conspiracy, and monopoly have been performed by the defendants, or

some of them, within the District of Columbia.

#### DESCRIPTION OF DEFENDANTS

5. The defendant United States Gypsum Company (sometimes referred to hereinafter as U.S.G.) is a corporation organized under the laws of the State of Illinois and having its principal offices in Chicago, Ill.

6. The defendant National Gypsum Company (sometimes referred to hereinafter as National) is a corporation organized under the laws of the State of Delaware and having

its principal offices in Buffalo, N. Y.

7. The defendant Certain-teed Products Corporation (sometimes referred to hereinafter as Certain-teed) is a corporation organized under the laws of the State of Maryland and having its principal offices in New York, N. Y.

8. The defendant The Celotex Corporation (sometimes referred to hereinafter as Celotex) is a corporation organized under the laws of the State of Delaware and having its

principal offices in Chicago, Ill.

9. The defendant Ebsary Gypsum Company, Inc. (sometimes referred to hereinafter as Ebsary), is a corporation organized under the laws of the State of New York and having its principal offices in New York, N. Y.

10. The defendant Newark Plaster Company (sometimes referred to hereinafter as Newark) is a corporation organized under the laws of the State of New Jersey and

having its principal offices in Newark, N. J.

11. The defendant Samuel M. Gloyd is the sole owner of an unincorporated business venture doing business under the name of Texas Cement Plaster Company (sometimes referred to hereinafter as Texas) and having its principal offices in Oklahoma City, Okla. 12. The above-named defendants will sometimes be re-

ferred to hereinafter as the defendant companies.

13. The defendant Sewell L. Avery was President of U.S.G. from 1920 to 1936, and is, and has been since the year 1936, Chairman of the Board of Directors of U.S.G. His business address is 300 West Adams Street, Chicago, Ill.

14. The defendant Oliver M. Knode is President of U.S.G. His business address is 300 West Adams Street, Chicago,

15. The defendant Melvin H. Baker is President of National. His business address is 192 Delaware Avenue,

Buffalo, N. Y.

16. The defendant Bror H. Dahlberg is President of Celotex and Chairman of the Board of Directors of Certainteed. His business address is 919 North Michigan Avenue,

Chicago, Ill.

6 17. The defendant Henry J. Hartley is President of Certain-teed. His business address is 100 East

42d Street, New York, N. Y.
18. The defendant Frederick G. Ebsary is President of Ebsary. His business address is 52 Vanderbilt Avenue;

New York, N. Y.

19. The defendant Frederick Tomkins is President of Newark. His business address is 65 Bridge Street, Newark, N. J.

# THE NATURE OF THE TRADE AND COMMERCE INVOLVED IN THIS COMPLAINT

20. The defendant companies are engaged in the manufacture of gypsum products, principally gypsum board and gypsum plaster, at plants located throughout the United States. Said companies sell said gypsum products in interstate commerce to distributors and consumers within the States east of the Rocky Mountains, and in commerce between the States and the District of Columbia to distributors and consumers within the District of Columbia. Said sales area, including each of the States east of the Rocky Mountains and including the District of Columbia, will be referred to hereinafter as the Eastern area. The defendant companies manufacture and sell 100% of all gypsum board and 80% of all gypsum plaster manufactured and sold in the Eastern area.

#### A. Description of gypsum and of gypsum products

21. Gypsum is the primary constituent of various important products used in the building construction industry.

It is a rock-like mineral composed of calcium sulphate in combination with water, and is found in deposits in numerous states of the United States and in Canada. After the rock is mined or quarried, it is crushed and subjected to a process known as calcination, which involves driving off part of the water originally combined with the calcium sulphate by heating the crushed gypsum in large kettles or kilns to a temperature above the boiling point of water. The resulting product, known as calcined gypsum or stucco, has the characteristic of readily recombining with water

to form a hard, rigid mass.

are wall plaster and gypsum board. In addition, there are several miscellaneous less important products of calcined gypsum used in the building industry, such as gypsum block or tile. In 1939, the sales value of all products of calcined gypsum used in the building industry in the United States amounted to approximately \$42,000,000, \$17,000,000 of which was accounted for by plaster and \$23,000,000 of which was accounted for by gypsum board.

23. Until the year 1900, the principal ingredient of all wall plaster was lime. About 1900, however, gypsum became commercially important as an ingredient of plaster in place of lime. Since that time, gypsum has gradually displaced lime in plaster, and over 90% of all plaster now used in building construction in the United States is made

with gypsum.

24. Commercial production of gypsum board commenced about 1905. For many years thereafter, by far the greatest amount of gypsum board produced was board designed to be used as a base for plaster in wall and ceiling structures and known as plasterboard. About 1925, a board smaller than plasterboard, known as gypsum lath, was introduced on the market as a plaster support. By reason of the smaller and, therefore, more convenient size of gypsum lath; it has displaced plasterboard in new construction. and plasterboard is now used solely for repair work. Gypsum lath and plasterboard constitute approximately 50% of all products used as a support for plaster in all wall and ceiling structures, and over 90% of all such products in wall and ceiling structures in residential buildings. The sales value of gypsum lath and plasterboard manufactured by the defendant companies and sold in the United States in 1939 was about \$13,000,000, over 90% of which was that of board sold in the Eastern area.

25. Several years after the first commercial manufacture of plasterboard, a gypsum board, known as wallboard and designed to be used as a finished panel in place of

plaster and lath in wall and ceiling structures, was introduced on the market. The production of this board was greatly stimulated by the World War of 1914-1918 by reason of the extensive used of gypsum wallboard by the Government of the United States in temporary structures such as barracks. Gypsum wallboard is now one of the most important of various boards on the market which are used as substitutes for plaster and lath. The sales value of gypsum wallboard manufactured by the defendant companies and sold in the United States in 1939 was about \$8,500,000, over 90% of which was that of board sold in the Eastern area.

26. All gypsum board consists of a flat, thin core of hardened calcined gypsum covered on both surfaces with heavy paper, known as liners. Since gypsum lath and plasterboard are intended to support plaster, the paper liners with which the surfaces of the gypsum core are covered are coarse and absorbent in order to permit the plaster to penetrate through the paper and to unite with the gypsum core. Because gypsum wallboard is a substitute for plaster and lath, and is, therefore, not covered with plaster, one of its liners consists of a good grade of heavy, smooth paper.

27. Since about the year 1934, gypsum board sometimes has been covered on one surface with a metallic/foil for the purpose of increasing the heat-insulating qualities of the wall or ceiling structure in which said metallized board is used. Since about the year 1936, gypsum lath sometimes has been perforated for the purpose of permitting the plaster, when applied to the lath, to penetrate through the perforations and to form heads on the back of the lath, which act as mechanical keys to increase the bond between the lath and the layer of plaster.

28. The manufacture of plaster from calcined gypsum involves a relatively simple operation consisting principally of the addition of chemical compounds to the dry calcined

gypsum to retard the hardening of the finished product, and of hair or fiber to increase its strength. The manufacture of gypsum board from calcined gypsum involves a much more complicated operation requiring expensive equipment and machines. All gypsum calcining plants are equipped to manufacture gypsum plaster, but said plants are not always equipped to manufacture gypsum board. 29. The usual process of manufacturing gypsum board is as follows: Calcined gypsum is mixed with water to form a thick plastic mass known as a sturry. An adhesive to increase the bond between the core and the liners is mixed, either with the dry calcined gypsum or with the slurry. To the slurry is added a so-called aggregate to lighten the weight of the finished board. Until 1929, the most commonly used aggregate was sawdust. Since 1929, the aggregate has generally been composed of soap foam or chemical compounds, which cause the formation of numerous minute voids in the board. After the addition of the aggregate to the slurry, the mixture is spread upon the lower liner and the upper liner is placed upon the top of the mixture. The calcined gypsum and water are then permitted to "set" to form a hard, rigid core, firmly bonded to the liners.

30. Whenever the term "plaster" is used hereinafter it

30. Whenever the term "plaster" is used hereinafter it shall mean gypsum plaster; whenever the terms "lath," "plasterboard," and "wallboard" are used hereinafter they shall mean gypsum lath, gypsum plasterboard, and gypsum wallboard, respectively; whenever the terms "gypsum board" or "board" are used hereinafter they shall include

lath, plasterboard, and wallboard.

# B. Description and history of the manufacturers of gypsum products

31. U.S.G. was incorporated in 1901 to effect a merger of thirty-five producers, processors, and distributors of gypsum products. From that date to the present, it has been the largest producer of gypsum board and plaster in the United States, producing and selling in 1939 approxi-

mately 55% of all gypsum board and approximately 40% of all plaster manufactured and sold in the Eastern area. During the last twenty years, U.S.G. has acquired the gypsum plants of ten other producers, including the Niagara Gypsum Company (sometimes referred to hereinafter as Niagara) which, at the date of its acquisition by U.S.G. in 1929, had been engaged in the production of plaster and gypsum board for over ten years. U.S.G. now operates sixteen plants in the Eastern area, at twelve of which board is produced.

32. Since 1925, U.S.G. has expanded into fields of other allied building materials, and it is now one of the most important manufacturers of lime, metal lath, asphalt shingle and roofing, fiber insulation board, insulation wool, paper, texture and casein paints, acoustical materials, and

many other products used in the building industry.

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33. National is the second largest producer of gypsum products in the United States, producing in 1939 approximately 23% of all gypsum board and over 20% of all plaster manufactured and sold in the Eastern area. It was incorporated in 1925 and commenced production of gypsum board and plaster in 1926. In 1935 National acquired the assets, including three plants, of Universal Gypsum & Lime Company (sometimes referred to hereinafter as Universal), which company had been manufacturing gypsum board and plaster since 1922. In 1936, National acquired the assets, including two plants, of the Atlantic Gypsum Products Corporation (sometimes referred to hereinafter as Atlantic), which had been producing gypsum board and plaster since 1926. National now operates ten plants in the Eastern area, seven of which produce gypsum board.

34. In 1930, National, like U.S.G., commenced to expand into fields of other allied building materials and is now engaged in the production of lime products, acoustical materials, texture and casein paints, and other products used

in the building industry.

35. Certain-teed is the third largest producer of 11 gypsum products in the United States. In 1939 it produced about 12% of all gypsum board and about 10%. of all plaster manufactured and sold in the Eastern area. Certain-teed did not enter the gypsum industry until 1923 after it had become well established as an important producer of roofing materials, paints and varnishes, composition flooring, and paper. In 1923 Certain-teed entered the plaster business by acquiring six gypsum plants of the Acme Cement Plaster Company, but did not commence manufacturing gypsum board until 1926, and then only at a single plant. In 1928, Certain-teed acquired The Beaver Products Company, Inc., and the Beaver Board Company (sometimes referred to hereinafter as Beaver). Beaver had been for many years an important producer of fiber wallboard, and entered the gypsum industry in 1920 by the purchase of the American Cement Plaster Company, with six g psum plants, four of which produced board, and Bestwall Manufacturing Company, with one plant equipped to manufacture board. Certain-teed now operates five plants, four of which produce gypsum board.

36. The defendants Celotex, Ebsary, Newark, and Texas are single plant operators and, together, account for not more than approximately 10% of the gypsum board and

plaster manufactured and sold in the Eastern area.

37. Celotex, which for many years has been the largest producer of fiber insulation board in the United States,

is a newcomer in the gypsum industry. In 1937, it acquired a controlling stock interest in, and in 1939 it acquired the assets of, The American Gypsum Company (sometimes referred to hereinafter as American), which had been a producer of plaster since about 1910, and of gypsum board since 1920.

38. Ebsary has been engaged in the manufacture of plaster since 1911 and of gypsum board since 1928.

Newark has been engaged in the production of plaster since 1922, but did not commence the manufacture of gypsum board until 1937 when it acquired the Kelley Plasterboard Company, Inc. (sometimes referred to hereinafter as Kelley Plasterboard), which had been engaged in the production of gypsum board at a single plant since before 1918. Texas has been manufacturing plaster since about 1910 and gypsum board since 1924.

## C. The distribution of gypsum products

39. The defendant companies sell most of the gypsum board and plaster manufactured by them, in interstate-commerce and in commerce between the States and the District of Columbia, to retail building material dealers located throughout the Eastern area. Said dealers resell said gypsum products principally to building contractors. Since 1929 the defendant companies have refrained from selling

said gypsum products direct to contractors.

40. Said gypsum products are transported by truck or railroad to the yards of said dealers, usually from the plants in which the products are manufactured, but sometimes from warehouses, owned by the larger defendant companies and conveniently located throughout the Eastern area to serve retail dealers. Gypsum board is usually transported in mixed cars or trucks of board, plaster, and miscellaneous gypsum products, and straight carload or truckload shipments of board are infrequent.

41. The defendants U.S.G., National, and Certain-teed sell said gypsum products to retail dealers, as aforesaid, within all of the States embraced within the Eastern area. The other defendant companies sell gypsum products produced by them in some, but not all, of the States within the

Eastern area.

42. The defendant companies sell in interstate commerce a substantial part of the gypsum board manufactured by

them to various small manufacturers of calcined gypsum and plaster not engaged in the manufacture of gypsum board, sometimes referred to hereinafter as manufacturing distributors. Said manufacturing distributors purchase said gypsum board at a discount from the defendant companies' price to dealers and resell said board to dealers in competition with the defendant companies. Said manufacturing distributors usually ship said board in mixed cars or trucks made up of gypsum board purchased aforesaid and of plaster produced by said manu-

facturing distributors.

43. Prior to the year 1932, the defendant companies and others engaged in the manufacture of gypsum board and plaster sold a substantial part of the board and plaster manufactured by said companies to building material jobbers at a discount from said companies' price to dealers. Said jobbers resold said board to retail dealers in competition with the defendant companies and other manufacturers of plaster and board. Some of said jobbers were also engaged in the manufacture of plaster from calcined gypsum at mixing plants owned or operated by said jobbers. Since the year 1932, no substantial amount of gypsum board or plaster has been distributed by the defendant companies through jobbers.

#### OFFENSES CHARGED

44. Defendants are, and have been for many years last past, parties to contracts in restraint of trade and commerce in gypsum board, plaster, and miscellaneous gypsum products among the several States, in violation of Section 1 of the Sherman Antitrust Act. Defendants are, and have been for may years last past, actively engaged in a continuing combination and conspiracy in restraint of trade and commerce in said gypsum products among the several States, in violation of Section 1 of the Sherman Antitrust Act. Defendants are monopolizing, and have monopolized for

many years last past, trade and commerce in said gypsum products among the several States, in violation of Section 2 of the Sherman Antitrust Act. Defendants are, and have been for many years last past, attempting to monopolize trade and commerce in said gypsum products among the several States and are, and have been for many years last past, actively engaged in a continuing combination and conspiracy to monopolize trade and commerce in said gypsum products among the several States, in violation of Section 2 of the Sherman Antitrust Act. Defendants are, and have been for many years last past, parties to contracts in restraint of trade and commerce in said gypsum products between the States and the District of Columbia, in violation of Section 3 of the Sherman Antitrust Act. Defendants are, and have been for

many years last past, actively engaged in a continuing combination and conspiracy in restraint of trade and commerce in said gypsum products between the States and the District of Columbia, in violation of Section 3 of the Sherman Antitrust Act. Said unlawful contracts, combination, conspiracy, monopoly, and attempt to monopolize will

be referred to hereinafter as the combination.

45. Said combination has been formed, has been carried out, and is being carried out by each of the defendant companies (acting, in part, through those of their officers and directors made defendants herein) and by other companies hereinafter referred to engaged in the manufacture of said gypsum products. Said companies have entered into, have carried out, and are carrying out said combination for the purpose, and with the effect, of restraining, dominating, and controlling the manufacture and distribution of said gypsum products in the Eastern area by:

(a) Concertedly raising and fixing at arbitrary and noncompetitive levels the prices of gypsum board manufactured

and sold by said companies in the Eastern area;

(b) concertedly standardizing gypsum board and its method of production by limiting the manufacture of board to uniform methods, and by producing only uniform kinds of board, for the purpose, and with the effect, of eliminating competition arising from variations in methods of production and in kinds of board manufactured and distributed in the Eastern area;

(c) concertedly raising, maintaining, and stabilizing the general level of prices for plaster and miscellaneous gypsum products manufactured and sold by said companies in the

Eastern area:

(d) concertedly refraining from distributing gypsum board, plaster, and miscellaneous gypsum products manufactured by said companies through jobbers in the Eastern area, and concertedly refusing to sell said products to jobbers at prices below said companies' prices to dealers, for the purpose, and with the effect, of eliminating substantially all jobbers from the distribution of said gypsum products in the Eastern area;

(e) concertedly inducing and coercing manufacturing distributors to resell, at the prices raised and fixed by said companies as aforesaid, gypsum board purchased from

said companies.

46. Said combination was entered into and has been, and is being, carried out by the defendant companies in part under the guise of numerous license agreements purporting

to relate to the use of certain patents owned by the defendant U.S.G. in the manufacture of gypsum board. To give color of legality to said combination, the defendant companies, and other companies hereinafter named, concertedly agreed among themselves to enter into, and did enter into, said license agreements. Said license agreements are not bona fide patent license agreements reasonably designed to secure to U.S.G. the pecuniary reward for valid patent monopolies, but were entered into and

executed for the illegal purposes described in paragraphs 44 and 45 hereof. The formation and operation of said combination is more fully set forth in

paragraphs 47 to 120 hereof.

#### THE FORMATION OF THE COMBINATION

A. The patent litigation leading up to the formation of the combination

47. The combination was formed during the period between the month of September 1925 and early in the year 1930. It has its roots, however, in litigation surrounding certain improvement patents relating to the edges of gyp-

sum board.

48. Until 1912, the edges of the core of all gypsum board were exposed and unprotected. About 1912, U.S.G. commenced the manufacture and distribution of a board with the edges bound and sealed by folding the lower liner over the edges of the core. This improvement was covered by United States Letters Patent No. 1,034,746, issued on August 6, 1912, upon the application of Clarence W. Utzman, and assigned to U.S.G. A copy of said patent is set forth as Exhibit No. 1 in the appendix hereto. Said patent will be referred to hereinafter as the Utzman patent, and board embodying the edges described in said patent will be referred to as closed-edge board as distinguished from board with an unprotected edge, referred to hereinafter as open-edge board.

49. The closed-edge board represented a substantial improvement of that then on the market by eliminating chipping and crumbling of the core at the edges. Its introduction on the market by U.S.G. and the consumer demand for it which followed eventually stimulated other manufacturers to produce and market board with a protected edge. The result was a series of infringement suits by

U.S.G.

50. On July 14, 1917, U.S.G. filed suit against Bestwall Manufacturing Company in the District Court of the

United States for the Northern District of Illinois, and obtained, on July 21, 1919, a judgment holding the Utzman patent valid and infringed by Bestwall (258 Fed. 647). The judgment of the District Court was affirmed by the Circuit Court of Appeals for the Seventh

Circuit on January 4, 1921 (270 Fed. 542).

51. After the filing of the above suit, Bestwall sought to avoid the Utzman patent by manufacturing a board with a modified form of closed edge. In 1920 Beaver acquired Bestwall and continued the manufacture of said board through Bestwall. On June 13, 1921, U.S.G. filed a supplemental bill against Bestwall and Beaver, alleging that this new board infringed the Utzman patent. On July 21, 1925, the district court sustained U.S.G.'s claim and entered judg-

ment against Beaver (15 F.(2d) 704).

52. The aforesaid decisions against Bestwall and Beaver established the validity of the Utzman patent and construed the scope of the patent so broadly as to make manufacture of a closed-edge board by a competitor of U.S.G. impossible without infringing said patent. The superior position which this gave to U.S.G. in the manufacture of a protected-edge board was further increased by the acquisition by that company in, 1920 of United States Letters Patent No. 1,358,508, known as the Birdsey patent, which covered board with the upper and lower parts of the edges protected, but with the center part exposed, manufactured by folding both the top and bottom liner sheets over the sides of the core, turning them inward, and embedding them in the body of the core.

53. Between 1920 and 1925, American and Universal manufactured board with semiprotected edges somewhat like that covered by the Birdsey patent. During the same period, Niagara, as a licensee of American under a patent owned by American and purporting to cover board with semiprotected edges, manufactured the same kind of board as American. After the decision of the district court against

Beaver, U.S.G. filed suit against American on September 22, 1925, and against Universal on September 24, 1925, alleging infringement of both the

Utzman and Birdsey patents.

54. The period from the latter part of 1925, after U.S.G. had obtained the judgment against Beaver and after the filing of the infringement suits against American and Universal, until the year 1930, was marked by efforts by all of the parties to settle the aforesaid litigation, expansion of these efforts into a comprehensive plan for stabil-

ization of prices in the gypsum industry under the leadership of U.S.G., temporary delay in the execution of this plan with a resulting intensification of price competition in the industry, and eventual adoption of the plan by every important board manufacturer in the Eastern area.

## B. The period from September 1925 to July 1926

55. Beginning after September 1925, and continuing into the year 1926, numerous conferences were had between Sewell Avery, then president of U.S.G., Augustus Blagden, then president of Beaver, and Frank Griswold, then vice president of American, to consider compromises of the suits by U.S.G. against Beaver and American. The conclusions reached by Avery, Blagden, and Griswold at these conferences are set forth in paragraphs 56 to 58 hereof, as follows:

56. The industry had nothing to gain by further prosecution of the suits then pending. The litigation of the last nine years had already created bitterness in the industry which reflected itself in increasing price competition in an industry which until 1925 had been unusually stable and profitable. Further prosecution of the Beaver and American suits would produce one of two undesirable results: (1) A decision by an appellate court holding the Utzman patent invalid, or at least narrow in scope, the effect of which would be to permit every company in the industry

to manufacture closed-edge board and to compete freely in its sale; (2) a decision by an appellate court sustaining the validity of the Utzman patent and declaring Beaver and American infringers, the effect of which (in the absence of a patent licensing arrangement) would be to compel Beaver, American, and other manufacturers of board with closed or semiprotected edges to manufacture board with noninfringing edges and to reduce prices to promote the sale of such board in competition with closed-edge board.

57. U.S.G.'s recent successes in the courts had placed it in a strategic position to dominate the industry by licensing all board manufacturers in the Eastern area to manufacture the closed-edge board under the Utzman patent with the right reserved to U.S.G. to fix the selling prices of its licensees. Under such licenses, the industry could unite to produce a uniform board and to distribute it at

prices controlled and stabilized by U.S.G.

58. Avery, Blagden, and Griswold agreed among themselves that efforts should be made to induce the industry to enter into license agreements with U.S.G. having for their purpose long-term price stabilization of the board industry. Blagden and Griswold agreed to act as a liaison

between U.S.G. and the industry for this purpose.

59. Commencing in April 1926, Blagden and Griswold held a series of meetings and conferences with all companies manufacturing and selling gypsum board in the Eastern area. At said meetings and conferences, U.S.G.'s proposal to license the industry as a whole under the Utzman patent and the resulting advantages of standardized production and uniform prices at stabilized levels under the control of U.S.G. were explained by Blagden and Griswold and discussed by the representatives of the companies in attendance.

60. The response of the industry was prompt and unanimous. At a meeting in May 1926, attended by representatives of every company manufacturing and selling board in the Eastern area, including each of the defendant

companies then manufacturing board, and by repre-20 sentatives of the defendants Certain-teed and National, which were about to commence the manufacture of board, each of said companies agreed to become a licensee of U.S.G. under the Utzman patent and U.S.G. agreed to license each of the other companies to use said patent, provided a contract with satisfactory provisions

concerning royalties and price control could be agreed upon.

61. The form of the contract proved, however, to be a stumbling block in the program. Avery, having obtained an agreement from all board manufacturers in the Eastern. area to become licensees of U.S.G. under the Utzman patent, proposed a contract involving not only the Utzman patent, but 29 other patents, the most important of which was a patent covering a machine for the manufacture of closededge board, and 38 applications for patents. Under the proposed contract, each of the licensees was required to admit the validity of the patents then issued and of patents subsequently to be issued on the applications covered by the contract; to agree not to contest the validity and scope of said patents; and to pay royalties on all board manufactured by it, whether patented or unpatented, until February 10, 1937, the date of expiration of the machine patent. Price control by U.S.G. was, by the terms of the contract, to continue only until August 6, 1929, the date of expiration of the Utzman patent.

62. The members of the industry considering licenses objected to this contract. Said companies were unwilling to bind themselves to pay royalties for a period of almost eleven years for patents most of which they did not desire to use and the validity and scope of most of which were unknown to said companies. Said companies urged that, if royalties were to be paid until 1937, control of licensee prices by U.S.G. should not cease in 1929.

63. For the foregoing reasons, said companies proposed that the license agreements under consideration cover only

the Utzman patent and run only until the expiration of said patent. Avery rejected said counterproposal and insisted upon the contract submitted by him. The result was a stalemate in negotiations concerning the licenses, except with respect to four companies.

### C. The 1926-1927 license agreements

64. Between July and September 1926, Beaver and Universal elected to accept the contract proposed by U.S.G. in order to settle the aforesaid suits pending against them. A compromise of the suit between U.S.G. and Beaver was executed on July 29, 1926, and a compromise of the suit between U.S.G. and Universal was executed on September 17, 1926. On the same days on which said compromises were executed both Beaver and Universal entered into substantially identical license agreements with U.S.G. A copy of the Beaver agreement is set forth as Exhibit No. 2 in the appendix hereto. So far as material here, said license agreements provided in substance as follows:

(a) U.S.G. licensed Beaver and Universal to use inventions covered by the Utzman patent, 29 other patents, including the aforesaid machine patent, and 38 applications for patents, in manufacturing gypsum board, until the expiration of the machine patent on February 10, 1937.

(b) U.S.G. reserved the right to determine and fix, during the life of the Utzman patent, the price at which said licensees sold closed-edge board.

(c) Said licensees agreed to pay specified royalties on all board manufactured by them, whether patented or un-

patented, until February 10, 1937.

(d) Said licensees agreed to admit that all board having a protected edge fell within the scope of the Utzman patent, during the life of said patent, and that, after the expiration of said patent, all board having a protected

piration of said patent, all board having a protected edge was made under the machine patent or under other patents covered by the license agreements. (e) Said licensees acknowledged, and agreed not to contest, the validity of all patents involved in the license agreements and of all patents subsequently issued on applica-

tions involved in said agreements.

65. During the fall of 1926 and the spring of 1927, Griswold and Blagden continued to agitate for the execution of license agreements by the rest of the industry in the Eastern area, and numerous meetings and conferences were held to induce the industry to accept licenses. As a result of these meetings and conferences, and of the persuasions of Blagden, Griswold, and Avery, Atlantic, on March 5, 1927, and Texas, on April 18, 1927, entered into separate license agreements with U.S.G. which were substantially identical with the aforesaid Beaver and Universal agreements.

66. Pursuant to the terms of said agreements, U.S.G., immediately following the execution of said agreements, exercised its right to determine and fix the selling prices

of its licensees for board.

## D. The period from April 1927 to May 1929

67. Despite the capitulation of the aforesaid four companies, the rest of the industry remained adamant in its refusal to accept the contract as submitted by U.S.G. The period from 1927 to May 1929 was marked by an intensification of competition in the board industry, which demonstrated the necessity for unanimity of action by the industry if stabilization of board prices was to be accomplished by the licensing plan.

68. Late in 1926, Certain-teed commenced the manufacture of open-edge board. To overcome consumer preference for the closed-edge board, Certain-teed sold its open-edge board at a differential below the price of closed-edge board. The breakdown of license negotiations,

board. The breakdown of license negotiations, 23 with the prospect that Certain-teed would continue indefinitely the manufacture of open-edge board, stimulated Certain-teed to expand its market by further

69. The introduction of the open-edge board on the market by Certain-teed at reduced prices constituted a substantial competitive threat to the rest of the board industry. American, National, and Niagara, which were manufacturing board with semiprotected edges, attempted to meet the competition of the open-edge board by marketing a second grade board which said companies sold at about the same price as that of open-edge board. U.S.G. refused

to reduce, or to permit its licensees to reduce, the basic prices of closed-edge board, but agreed to permit said licensees to manufacture and distribute at reduced prices a second grade closed-edge board. Universal commenced marketing said second grade board in the fall of 1927 at

prices below those for its first grade product.
70. Early in 1928, Certain-teed acquired Beaver, the second largest producer of board at that time and a licensee of U.S.G. U.S.G. refused to modify the royalty provision of its license agreement with Beaver to limit royalties to patented board only and thus to permit the production of open-edge board at the Beaver plants if deemed necessary by Certain-teed. Certain-teed, therefore, refused to assume the Beaver agreement and commenced the production of open-edge board at all of the Beaver plants.

71. During the same year, three other companies commenced manufacturing and marketing open-edge board: Ebsary early in the year, and American and Niagara after July 11, 1928, when the District Court of the United States for the Northern District of Ohio held that the semiprotected-edge board of American infringed the U.S.G.

Birdsey patent.

72. The substantial increase in the amount of open-edge board on the market in 1928 caused U.S.G. and those of its licensees not yet doing so, to commence in that year the manufacture and distribution of a second grade closed-edge board, and to sell the same at prices competitive with those

for open-edge board.

73. To meet the competition of the second grade closed-edge board, manufacturers of open-edge board reduced the prices of said board. Manufacturers of second grade closed-edge board, in turn, reduced the prices of said hoard. This process of price reductions was repeated from time to time during the year 1928. By the year 1929, prices for all gypsum board were substantially below 1927 levels. During the year 1928, when prices for gypsum board were declining, prices were substantially reduced for

other gypsum products, principally plaster and block.
74. The vigorous competition of 1928 caused a revival of interest on the part of gypsum board producers in price stabilization for all gypsum products. Avery urged that those companies in the industry not yet licensees of U.S.G. reconsider his proposal for an industry-wide patent licensing plan covering board with price control by U.S.G. Eugene Holland, then president of Universal, agreed with Avery to promote the licensing plan. In the latter part of 1928

and the early part of 1929, meetings and conferences, some of which were arranged by Holland, were held by the companies not yet licensees. At said meetings, further consid-

eration was given to the licensing program.

75. By 1929, however, U.S.G.'s proposal of licenses running until 1937 had become even less attractive to the unlicensed board manufacturers than it had been two years before when said companies had rejected it. The expiration date of the Utzman patent was August 1929. Price control beyond said date under color of that patent alone was, therefore, not possible: To induce the other companies to enter into agreements running until 1937, U.S.G., through Avery, assured representatives of said companies that, if said agreements were executed, U.S.G. would then take steps to control the prices of its licensees throughout the life of the licenses under color of some patent. In reliance upon these assurances, National, Certain-teed, Ebsary, and Niagara agreed among themselves and with U.S.G. to become licensees of U.S.G.

E. The May 1929 license agreements

76. During the period between May 16 and May 22, 1929, after meetings and conferences attended by representatives of U.S.G., representatives of each of its licensees, and representatives of Certain-teed, National, Ebsary, and Niagara, each of the latter companies entered into separate license agreements with U.S.G. A photostatic copy of the license agreement with Ebsary, set forth as Exhibit No. 3 in the appendix hereto, is substantially identical with each of said agreements. Said agreements, so far as material here, were substantially the same as the Beaver agreement, except that said agreements contained the following additional provisions:

(a) The licensees agreed to sell gypsum board to manufacturers, jobbers, and other wholesale distributors only

with the written consent of U.S.G.

(b) U.S.G. agreed to license said licensees to use the methods covered by certain of its patents in bundling gypsum board for shipment and said licensees agreed to use only the methods covered by said patents in bundling gypsum board.

77. In addition to the agreements contained in the aforesaid license agreements, U.S.G. and its licensees mutually

agreed among themselves as follows:

(a) Said companies would immediately discontinue the manufacture of unpatented open-edge board and second

grade closed-edge board and would dispose of inventories of said boards at prices to be determined and fixed by U.S.G. After disposal of said inventories, all companies would manufacture and sell a closed-edge board manufactured and bundled by the processes and methods used by U.S.G.

(b) U.S.G. would advance and stabilize the prices for board immediately after the execution of said license agreements. As prices for board were increased, all companies would increase their prices for plaster and miscellaneous

gypsum products.

26 (c) U.S.G. would continue to control, through the use of other patents, the price of its licensees for board manufactured by said licensees after the expiration of the Utzman patent in August 1929.

### F. The period from June 1, 1929, to October 1929

78. Immediately after the execution of the May agreements, U.S.G. offered to enter into additional license agreements with its licensees, permitting them to use a new process developed by U.S.G. for lightening the weight of board, hereinafter referred to as the foam process. Said foam process was covered by pending applications for United States patents which U.S.G. expected to issue before the end of the year 1929. U.S.G. offered said additional agreements to its licensees pursuant to its agreement to continue price control after the expiration of the Utzman patent and to give color of legality to such price control by purporting to base it on licenses covering patents on the foam process.

79. The foam process consisted of the introduction of soap foam into the slurry as an aggregate to cause the formation of numerous air voids in the board. Said process required that the numerous minute bubbles in the foam be sufficiently stable and pliable to resist collapse during the process of manufacturing board. To obtain said stability and pliability in the bubbles, U.S.G. contemplated, at the time of its offer of the foam process to its licensees, the use of several methods, including, among others, the use of a colloidal agent, such as farinaceous paste, to reinforce

the walls of the bubbles.

80. At the time U.S.G. offered to license its licensees to use the foam process, Universal owned United States Letters Patent No. 1,230,297, issued to Charles E. Hite on June 17, 1917, and United States Letters Patent No. 1,500,452, issued to Joseph F. Haggerty on July 8, 1924, sometimes referred to hereinafter as the Hite and Haggerty or

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starch patents. The Hite patent, a copy of which is set forth as Exhibit No. 4 in the appendix hereto, purported to cover a heat-resistant, cementitious material, including calcined gypsum, containing voids produced by the use of a water-cooked, gelatinized carbohydrate such as starch. The Haggerty patent, a copy of which is set forth as Exhibit No. 5 in the appendix hereto, purports to cover an improved wallboard manufactured by the use of water-cooked starch gelatin to increase adhesion between the core and paper liners of the board.

81. For the purpose of inducing U.S.G. to purchase said starch patents, Universal asserted that the use of farinaceous paste in the foam process infringed said patents.

82. The contemplated use of farinaceous paste in the foam process to reinforce the walls of the bubbles did net, in fact, as U.S.G. well knew, infringe the Hite and Haggerty patents. In addition, other practicable and equally efficient methods for lending stability and pliability to the bubbles, not infringing the starch patents, were known to U.S.G. at the time of Universal's assertion, U.S.G. advised its licensees that the Hite and Haggerty patents were of doubtful validity and that the foam process did not infringe said patents.

83. Notwithstanding the facts alleged in paragraph 82 hereof, U.S.G. agreed to purchase the Hite and Haggerty patents from Universal provided its licensees would accept licenses covering said patents and the foam process. Each of the licensees agreed with U.S.G. and among themselves to accept said licenses and U.S.G. agreed to acquire, and

did acquire, the starch patents from Universal.

84. U.S.G. agreed to acquire, and did acquire, said starch patents, and U.S.G. and its licensees agreed to execute, and did execute, licensee agreements covering said patents for the purpose of giving color of legality to price control by U.S.G. of board manufactured by its licensees during the period between the date of expiration of the Utzman patent and the date of issuance of patents on the foam process.

G. The October and November 1929 license agreements

85. Immediately after the agreement of U.S.G. to acquire the starch patents, National, Certain-teed, Universal, Atlantic, Ebsary, American, and Kelley Plasterboard entered into new license agreements with U.S.G. Said agreements superseded those previously executed. A copy of

the Ebsaw agreement, set forth as Exhibit No. 6 in the appendix hereto, is substantially identical with each of said agreements. Said agreements, in so far as material here, provided in substance as follows:

(a) U.S.G. agreed to disclose the foam process to its

licensees.

(b) U.S.G. licensed its licensees to use the inventions covered by 50 patents, including the Hite and Haggerty patents, and 7 applications for patents, including the appli-

cations relating to the foam process.

(c) U.S.G. reserved the right to determine and fix the prices at which the licensees sold board embodying the improvements claimed in the Hite and Haggerty patents, or in any patents subsequently issued on the applications relating to the foam process.

(d). The licensees agreed to pay stipulated royalties on all board manufactured by them, whether patented or

unpatented.

(e) U.S.G. licensed the licensees to use the methods covered by certain of its patents in bundling gypsum board for shipment, and the licensees agreed to pay royalties on bundles of all kinds, whether patented or unpatented.

bundles of all kinds, whether patented or unpatented.

(f) The licensees agreed to sell gypsum board to manufacturers, jobbers, and other wholesale distributors only

with the written consent of U.S.G.

(g) The licensees acknowledged, and agreed not to contest, the validity of all patents then issued and of all patents subsequently issued on applications covered by

the agreements.

29 (h) U.S.G. agreed to reduce the royalties of its licensees by 1% if the foam process was rendered obsolete by other processes and if, but only if, U.S.G. permanently and wholly abandoned the foam process.

86. In addition to the agreements contained in said licenses, each of the licensees mutually agreed among them-

selves and with U.S.G. as follows:

(a) For many years prior to 1929, the licensees, except Ebsary and Kelley Plasterboard, had been using adhesives in the manufacture of board to increase adhesion between the core and liners. Each of said licensees agreed to consider said use of adhesives as falling within the scope of the Hite and Haggerty patents for the purpose of permitting price control by U.S.G. during the life of said patents. Ebsary and Kelley Plasterboard agreed to commence using adhesives for the same purpose.

(b) The licensees agreed to use the foam process in the manufacture of gypsum board as soon as their plants could be equipped, and agreed to manufacture and distribute a closed-edge board, manufactured and bundled by substantially the same processes as those employed by U.S.G.

87. By virtue of the aforesaid agreements, U.S.G., by 1930, was authorized to control the prices of nearly all gypsum board manufactured in the United States east of the Rocky Mountains. Said price control was to last, by the terms of said agreements, until a date 17 years after the date of issuance of patents not then issued. By virtue of said agreements, all companies manufacturing and selling board in the Eastern area, except Texas, were obliged to manufacture a uniform, standardized board.

88. In February 1937, after the expiration of the 1927 agreement between U.S.G. and Texas, and after threats by U.S.G. of suit against Texas for infringement of the starch patents, Texas executed a new license agreement with U.S.G., now in effect, substantially the same as those de-

scribed above. Since this time U.S.G. has controlled the prices of all gypsum board manufactured in the Eastern area. The license agreement between Kelley Plasterboard and U.S.G. was assumed by the defendant Newark in 1938 upon the acquisition by Newark of Kelley Plasterboard and is now in effect. The license agreement between American and U.S.G. was assumed by the defendant Celotex upon the acquisition of American by Celotex and is now in effect. The license agreements of National, Certain-teed, and Ebsary with U.S.G. have been continuously since the year 1929, and are now, in effect.

#### THE OPERATION OF THE COMBINATION

89. Where the word "licensee" is used hereinafter it shall be deemed to include National, Certain-teed, Ebsary, and Texas throughout the period from the formation of the combination as aforesaid to the date of filing this complaint; American, Universal, Atlantic, and Kelley Plasterboard from the time of the formation of said combination to the respective dates of dissolution of said companies as aforesaid: the defendant Celotex from the date of its acquisition of American as aforesaid to the date of filing this complaint; and the defendant Newark from the date of its acquisition of Kelley Plasterboard as aforesaid to the date of filing this complaint.

- A. Control by U.S.G. over the prices and methods of manufacture and distribution of its licensees
  - 1. Control of prices and terms and conditions of sale for gypsum board
- 90. Throughout the period from the year 1929 to the date of filing this complaint, U.S.G. has determined and fixed the selling prices and terms and conditions of sale of its licensees for all gypsum board manufactured by said licensees. Throughout said period the licensees of U.S.G. have sold all gypsum board manufactured by them at the prices and on the terms and conditions of sale determined and fixed by U.S.G. as aforesaid. Pursuant to the agreements described in paragraphs 76 and 85 hereof, U.S.G. raised and stabilized the prices of gypsum board during

the period from 1929 to 1932, and has maintained said prices throughout the period from 1932 to the date of filing this complaint at high, arbitrary, and

non-competitive levels.

91. From time to time throughout said period, U.S.G. has circulated among its licensees numerous bulletins setting forth the aforesaid prices and terms and conditions of sale for gypsum board. The licensees, throughout said period, have adhered to said prices and terms and conditions of sale. The prices and terms and conditions of sale contained in said bulletins will sometimes be referred to hereinafter as the bulletin prices. Said bulletins, copies of forms of which are set forth as Exhibit No. 7 in the appendix hereto, have contained the following limitations and regulations upon sales of gypsum board by the licensees:

(a) Minimum prices to dealers f.o.b. specified basing

points;

(b) specified delivered price zones for rail delivery, with the applicable minimum delivered price to dealers for each zone;

(c) specified delivered price zones for truck delivery,
 with the applicable minimum delivered price to dealers for

each zone;

(d) specified areas in which dealers may pick up gypsum board at mills or warehouses, with applicable minimum

prices to dealers for such pickups;

(e) minimum quantities of gypsum board for: (1) Carload sales; (2) delivered truck sales; (3) pickups at mills or warehouses; (4) mixed carload and truckload sales; and (5) pooled car sales;

(f) standard sizes of gypsum board, with specified differentials for board of non-standard sizes and prohibition

of sales to dealers of board of non-standard sizes;

(g) specified "billing weights" for different sizes of board to be used by all licensees in calculating the transportation charge to be included in the net price to buyers;

(h) maximum cash discounts and terms of sale;

 (i) fixed price differentials to various classes of customers and prohibition of discounts to certain classes of buyers, including mail order houses and jobbers;

(j) prohibition of sales in quantities less than specified

minimums;

(k) prohibition of deliveries to job sites;

 prohibition of mixed car or truck sales at carload or truckload prices unless the carload or truckload quantity is composed entirely of gypsum products;

(m) prohibition of sales direct to builders or contractors,

with certain exceptions;

(n) prohibition of sales to the United States Government at other than dealer prices, except in the case of certain specified housing or building projects for which special price bulletins have been issued;

(o) prohibition of sales through commission salesmen;

(p) prohibition of sales to or through "brokers" or "commission houses";

(q) minimum charges to be added to delivered price for

railroad car switching;

(r) prohibition of the hiring of buyers' trucks, or the making of allowances or payments to dealers for unloading, storing, or trucking by dealers;

(s) prohibition of warehousing allowances, advertising allowances, or other forms of allowances or payments to dealers for services rendered by dealers to the licensees:

(t) prohibition of payments or credits by the licensees to buyers for claims by buyers for defective merchandise or for other reasons, until after enpreyed by IISC.

for other reasons, until after approval by U.S.G.;

(u) prohibition against direct or indirect reduction of minimum prices by rebates or other concessions to buyers, or "by reducing the price of other products" to buyers.

33 92. Throughout said period U.S.G., through its officers, employees, attorneys, and a corporation known as the Board Survey Company, has enforced adherence by the licensees to said bulletin prices and has investigated and policed alleged violations by the licensees of

said bulletin prices. U.S.G. has required its licensees to make regular reports of all sales of board by its licensees and to permit U.S.G. to audit the books of the licensees from time to time to enable U.S.G. to enforce said bulletin prices. The licensees frequently have filed complaints with U.S.G. of alleged violations of bulletin prices by other licensees and U.S.G. has, through the aforesaid agencies, regularly investigated said complaints. U.S.G. and its licensees have held numerous meetings at which the prices and terms and conditions of sale prescribed by U.S.G. in said bulletins and at which complaints of violations by licensees of said bulletin prices were discussed for the purpose of obtaining adherence by the licensees to said bulletin prices.

## 2. Control over methods of manufacture of the licensees

93. Throughout the period from the year 1929 to the date of filing this complaint, U.S.G. and its licensees, including the defendant companies, have, by concerted action, sought to standardize the production of gypsum board and have refrained from manufacturing and marketing openedge board and other board not within the agreed-upon scope of patents involved in the license agreements. During the years 1934 and 1935, the defendant National was induced by U.S.G. and the other licensees to refrain, and did refrain, from marketing a new lightweight board until the other licensees were equipped to manufacture and market a board of a similar weight.

3. Control of methods of distribution of licensees-control and elimination of jobbers

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94. For the purpose of limiting jobber distribution by the licensees to those jobbers who sold only to dealers and who maintained bulletin prices in sales to dealers, the defendant companies agreed in their license agreements to sell to jobbers only with the express consent of U.S.G. Pursuant to said agreement, U.S.G., during the period from 1929 to 1932, permitted its licensees, including the defendant companies who were then licensees, to sell only to jobbers who sold to dealers and who maintained bulletin prices in said sales.

95. To make more effective the control of distribution of gypsum board by U.S.G., U.S.G. and its licensees discussed and considered, at numerous meetings held during

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the period from 1929 to 1932, concerted elimination of jobber distribution by U.S.G. and its licensees. As a result of said meetings and for the purpose of eliminating distribution by U.S.G. and its licensees of gypsum board, plaster, and miscellaneous gypsum products through jobbers. U.S.G. and the licensees agreed among themselves to sell gypsum board to jobbers at no less than the minimum prices set by U.S.G. for sales of board to dealers and to sell plaster and miscellaneous gypsum products to jobbers at no less than the prevailing market prices to dealers for said gypsum products. Pursuant to said agreement, U.S.G. in the year 1932 issued and circulated among the licensees bulletins prohibiting sales to jobbers at less than dealer prices. Throughout the period from 1932 to the date of filing this complaint, U.S.G. and its licensees have refused to sell board to jobbers at less than the minimum dealer prices set by U.S.G. and have refused to sell plaster and miscellaneous gypsum products to jobbers at less than the prevailing market prices to dealers for said products.

B. Concerted control of prices and methods of distribution of unpatented gypsum products

96. The control by U.S.G. of gypsum board manufactured by its licensees, described in paragraphs 90 to 95 hereof, has been exercised from time to time throughout the period from the year 1929 to the date of filing this complaint upon gypsum board of the licensees not covered by valid patents involved in the licensee agreements, all as is more fully set forth in paragraphs 97 to 100 hereof. From time to time during said period, U.S.G. and its licensees have by concerted action controlled the prices and methods of distribution of plaster and miscellaneous gypsum products sold by U.S.G. and its licensees, all as is more fully set forth in paragraphs 103 to 107 hereof.

## 1. Gypsum board

a. The period from May 1929 to November 1929

97% Continuously during the period from May 1929 to November 1929, U.S.G., pursuant to the aforesaid agreement among U.S.G. and its licensees, determined and fixed the prices, and the licensees adhered to said prices, for unpatented open-edge board. During the period between August and November 1929, U.S.G. determined and fixed the prices, and the licensees adhered to said prices, for closed-edge board, despite the fact that during said period

U.S.G. did not own, or purport to own, patents covering said board.

b. The period from November 1929 to October 1935

98. Patents upon the foam process were not issued until October 8, 1935, May 4, 1937, and May 11, 1937. Copies of said patents, being United States Letters Patent Nos. 2,017,022; 2,079,338; and 2,080,009, are set forth as Exhibits Nos. 8, 9, and 10 in the appendix hereto. Throughout the period from November 1929 until October 1935,

U.S.G. exercised price control solely on the basis of the Hite and Haggerty patents. During said period, none of the licensees, except Universal, manufac-

tured board falling within the scope of said patents.

99. As described in paragraph 80 hereof, the Hite patent purported to cover board containing voids produced by a specified process involving the use of a water-cooked starch gelatin. No licensee, except Universal, manufactured during said period board with voids produced by said process.

100. As described in paragraph 80 hereof, the Haggerty patent purports to cover board manufactured by a specified process involving the use of a water-cooked starch gelatin to increase adhesion between the core and the liners of the board. During said period none of the licensees, except Universal, used a water-cooked starch gelatin to increase said adhesion, but all of said licensees used adhesives which were beyond the scope of the Haggerty patent.

c. The period from October 1935 to date .

101. During the period from October 1935 to the date of filing this complaint, a substantial part of the board produced by various of the licensees has not been covered by the aforesaid patents issued upon the foam process. For the reasons set forth in paragraphs 99 and 100 hereof, none of said licensees produced during said period board which was covered by the Hite or Haggerty patents.

102. Kelley Plasterboard did not commence using the foam process until said company was acquired by Newark in 1938. Texas did not commence using the foam process until after February 1937. During 1936 and 1937 National temporarily abandoned the use of the foam process. In 1937 American, which had been using the foam process since 1929, abandoned it and since that time neither it nor its successor, the defendant Celotex, has used the foam process.

2. Plaster and miscellaneous gypsum products

103. Beginning in May 1929, as U.S.G. raised and stabilized the prices of gypsum board as aforesaid,

U.S.G. and its licensees concertedly raised and stabilized the prices of plaster and miscellaneous gypsum products. From time to time throughout the period from the year 1929 to the date of filing this complaint, U.S.G. and its licensees have agreed among themselves to sell, and have sold, plaster and miscellaneous gypsum products on the basis of various of the terms and conditions prescribed by U.S.G. for the sale of gypsum board, including terms and conditions relating to basing points, cash discounts, trucking areas, advertising allowances, and delivered price zones.

104. As described in paragraph 40 hereof, gypsum board is customarily transported in mixed cars or trucks with plaster and miscellaneous gypsum products. Throughout the period from the year 1929 to the date of filing this complaint, U.S.G. and its licensees have concertedly refrained from selling plaster and miscellaneous gypsum products in mixed cars or trucks with gypsum board at prices below prevailing market prices for said plaster and

miscellaneous gypsum-products.

105. For many years past, it has been customary for dealers in gypsum products to enter into contracts with contractors to supply gypsum products to contractors for specific construction jobs at prices current at the time of execution of said contracts and, thus, to protect contractors against an increase in prices for gypsum products during the course of construction of said specific jobs. In turn, manufacturers of gypsum products have customarily entered into contracts with dealers to protect dealers against an increase in prices for gypsum products required by dealers to meet their outstanding specific job commitments. Said contracts between manufacturers and dealers have been, and are known as protected job contracts.

gypsum products from time to time have advanced, manufacturers have frequently permitted dealers to purchase said gypsum products at prices prevailing prior to the price advances. Said purchases have been made ostensibly under protected job contracts, but have involved material not actually covered by said contracts, but in excess of the amounts required for specific jobs for which dealers were committed. Manufacturers have knowingly permitted dealers to make said purchases at said prices for the purpose of allowing dealers a competitive concession. The effect of such concessions has been to retard from time to time advances in the prices of said gypsum products.

107. In the year 1936, U.S.G. and its licensees agreed among themselves to file all protected job contracts covering plaster and miscellaneous gypsum products with an agency

selected by a gypsum trade association, known as the Gypsum Statistical Institute. Said companies entered into said agreement to prevent by concerted action the granting by said companies to dealers of concessions described in paragraph 106 hereof, and thereby to facilitate increases in the prices of said gypsum products. Pursuant to said agreement, U.S.G. and its licensees have continuously from the year 1936 to the date of filing this complaint filed said protected job contracts with an agency selected by said Institute and have thereby raised and stabilized the prices of plaster and miscellaneous gypsum products.

#### C. Concerted control of manufacturing distributors

108. Throughout the period from the year 1929 to the date of filing this complaint, U.S.G. and its licensees have, by concerted action, induced and coerced manufacturing distributors purchasing gypsum board from U.S.G. and its licensees to resell said gypsum board to dealers and consumers at the bulletin prices determined and fixed by U.S.G. for sales of board by its licensees to dealers and consumers, as described in paragraph 91 hereof.

39 109. As a condition for the consent of U.S.G. to sales by the licensees of gypsum board to said manufacturing distributors, U.S.G. has required that said manufacturing distributors maintain and adhere to said bulletin prices in reselling said gypsum board to dealers and consumers. U.S.G. and its licensees have agreed among themselves to sell gypsum board to said manufacturing distributors only on condition that the distributors maintain, and adhere to, said bulletin prices.

110. U.S.G. and its licensees have required said manufacturing distributors, as a condition of sale, to agree, and said manufacturing distributors have so agreed, to resell gypsum board to dealers and consumers at said bulleting

prices.

111. Pursuant to said agreements, U.S.G. and its licensees have from time to time advised said manufacturing distributors of said bulletin prices, and have investigated and policed sales of gypsum board by said manufacturing distributors for the purpose of compelling said manufacturing distributors to maintain, and adhere to, said bulletin prices. Throughout said period, said manufacturing distributors have resold substantially all of the gypsum board, purchased from U.S.G. and its licensees as aforesaid, at said bulletin prices.

#### D. Subordinate license agreements

112. For the purpose of extending and strengthening the operation of the basic license agreements, U.S.G. and

certain of its licensees entered into separate license agreements covering the manufacture and sale of metallized board and perforated lath.

### 1. Metallized board agreements

113. In 1934 U.S.G. offered to license each of its licensees to manufacture and sell metallized board under a patent owned by U.S.G. and purporting to cover

metallized gypsum board. During the years 1934 and 1935, each of the licensees agreed among themselves and with U.S.G. to become, and did become, licensees of U.S.G. under agreements in which U.S.G. licensed said licensees to use said patent in the manufacture and sale of metallized board and reserved the right to determine and fix the prices at which said licensees sold metallized board. A copy of the Ebsary agreement, set forth as Exhibit No. 11 in the appendix hereto, is substantially identical with

cach of said agreements.

114. At the time of the execution of said license agreements, none of said licensees, except National, intended to manufacture metallized board, but all of said licensees, except National, intended, as U.S.G. well knew, to purchase metallized board from U.S.G. or National for resale to dealers and consumers. Notwithstanding said facts, U.S.G. required its licensees to execute said agreements in order to be enabled to purchase metallized board for resale to dealers and consumers. Throughout the period from the execution of said license agreements to the date of filing this complaint, U.S.G. has determined and fixed the minimum prices and terms and conditions of sale governing the sale by its licensees of metallized board, with the knowledge, and notwithstanding the fact, that a substantial part of the metallized board sold by its licensees, except National, during said period was purchased from National and U.S.G.

## 2: Perforated lath agreements

115. Early in the year 1936, U.S.G. offered to license its licensees to manufacture and sell perforated gypsum lath under a patent purporting to cover a gypsum lath with perforations of a certain dimension and number and with a designated spacing and relationship.

116. The license agreements proposed by U.S.G. reserved to U.S.G. the right to determine and fix the the prices of its licensees for said perforated lath. To induce said licensees to enter into said agree-

ments, U.S.G. agreed to fix the price of perforated lath at a differential above the price of straight lath.

117. In reliance upon U.S.G.'s commitment to fix the price of perforated lath at said differential, Certain-teed and American entered into said license agreements. Thereafter, Ebsary and Kelley Plasterboard executed similar agreements. A copy of the Certain-teed agreement, set forth as Exhibit No. 12 in the appendix hereto, is substan-

tially identical with each of said agreements.

118. By the terms of said agreements, U.S.G. authorized its licensees to manufacture perforated lath under said patent, with the right reserved to U.S.G. to determine and fix the prices of its licensees for perforated lath, and each of the licensees acknowledged the validity of, and agreed not to contest, said patent. Throughout the period from the date of execution of the first of said agreements to the month of May 1938, U.S.G. determined and fixed the prices of perforated lath at a differential above the prices of straight lath, and all of the licensees of U.S.G. sold perforated lath at said prices so determined and fixed by U.S.G.

119. At the time of the execution, and throughout the period of the operation, of said perforated lath license agreements, U.S.G., Certain-teed, and American were informed, sometimes by patent counsel, and believed that said patent was void and did not embrace in any of the specifications or claims thereof any patentable invention or discovery within the meaning of the patent laws of the United States. Said companies entered into said license agreements principally for the purpose of enabling U.S.G. to determine and fix the prices of perforated gypsum lath manufactured and sold by U.S.G. and its licensees. Said license agreements were not, in truth and in fact, bona fide patent license agreements and the exercise of price

control by U.S.G. under said agreements was not normally and reasonably adapted to protect the pecuniary rewards of a patentee under a lawful

patent monopoly.

120. The validity of said patent has not been presented to, or determined by, any court of the United States. Although U.S.G., during the years 1937 and 1938, notified various non-licensee manufacturers of perforated gypsum lath that said manufacturers were infringing said patent, U.S.G. has refrained from instituting infringement proceedings against said manufacturers. Pursuant to the terms of their license agreements, the licensees have refrained from contesting the validity of said patent.

#### THE EFFECT OF THE COMBINATION

121. By means of the combination, the defendants have controlled and dominated, for more than ten years, the manufacture and distribution of 100% of the gypsum board and 80% of the plaster and miscellaneous gypsum products manufactured and sold in the Eastern area and the defendants will, unless restrained, continue to dominate and control the manufacture and distribution of said gypsum products, at least until the year 1954 when the last of the U.S.G. patents on the foam process expires. Since the year 1929, all gypsum board sold by all manufacturers and all manufacturing distributors in the Eastern area has been sold at uniform and non-competitive prices dictated by U.S.G., with a resultant elimination of all price competition in the distribution of gypsum board from manufacturers to dealers. For the purpose of maintaining said uniform and non-competitive prices, the defendants have standardized the manufacture of board, have limited said distribution of board to themselves and to certain manufacturing distributors, and have completely eliminated from the distributive system wholesale distributors who might fail to maintain said prices.

122. Said uniform and non-competitive prices have been, throughout the period of the operation of the combination, substantially higher than those prices prevailing at the time of the formation of said combination in the year 1929. Said prices have failed to reflect substantial reductions in manufacturing costs which have occurred since the year 1929. Each of the defendant companies has thereby realized substantial profits in the manufacture and sale of gypsum board.

123. The uniformity among the defendant companies in the distribution of gypsum board has reflected itself in uniformity among said companies in the distribution of plaster and miscellaneous gypsum products. The defendant companies now distribute said products on the basis of many of the terms and conditions of sale prescribed by U.S.G. for the sale of gypsum board.

the sale of gypsum board.

#### PRAYER

Wherefore, plaintiff prays:

1. That the Court adjudge and decree that the aforesaid monopoly, attempt to monopolize, combination and conspiracy to monopolize, and contracts, combination, and conspiracy to restrain trade and commerce in gypsum board, plaster, and miscellaneous gypsum products among the several States, and between the States and the District of Columbia, are in violation of Sections 1, 2, and 3 of the

Sherman Antitrust Act. >

2. That the Court adjudge and decree that the defendants have monopolized, attempted to monopolize, combined and conspired to monopolize, and contracted, combined, and conspired to restrain trade and commerce in said gypsum products among the several States, and between the States and the District of Columbia, in violation of Sections 1, 2, and 3 of the Sherman Antitrust Act.

3. That the Court adjudge and decree that each of the aforesaid license agreements between the defendant U.S.G. and each of the other defendant companies is in violation of Sections 1, 2, and 3 of the Sherman Antitrust Act.

4. That the defendants and each of them, and their directors, officers, agents, representatives, and all persons or corporations acting on behalf of the defendants, be perpetually enjoined from continuing to carry out said monopoly, attempt to monopolize, contracts, combination, and conspiracy, and be required to desist and withdraw from all connection therewith, and be perpetually enjoined from in any way monopolizing, or attempting to monopolize, combining and conspiring to monopolize, or agreeing, combining, or conspiring to restrain trade and commerce in said gypsum products among the several States, and between the States and the District of Columbia, in violation of Sections 1, 2, and 3 of the Sherman Antitrust Act.

5. That the defendant companies, and each of them, be required to cancel the provisions of the aforesaid license agreements which (a) authorize the defendant U.S.G. to determine and fix the prices of gypsum board manufactured by the licensees, (b) provide for payment of royalties by the licensees on patents not used by the licensees or on gypsum board not manufactured or bundled by patents owned by U.S.G., and (c) prohibit the sale of gypsum board by the licensees to manufacturers, jobbers, and other distributors without the consent of the defendant U.S.G.

6. That the defendant companies, and each of them, and their directors, officers, employees, and agents, and all persons or corporations acting on behalf of said companies, be perpetually enjoined from entering into any license agreement relating to any gypsum products and containing provisions which (a) authorize the licensor to determine and fix the prices of its licensees, (b) provide for payment of

or on gypsum products not manufactured by the licensees of patents, or (c) control in any way the methods of distribution of the licensees.

7. That the defendant companies, and each of them, and their directors, officers, employees, and agents, and all persons or corporations acting on behalf of said companies, be enjoined from entering into any license agreement relating to gypsum products without first obtaining the consent of the Court.

8. That plaintiff have such other further and general re-

lief as may be proper.

9. That, pursuant to Section 5 of the Sherman Antitrust Act, writs of subpoena issue to such of the defendants as are not otherwise subject to service within the District of Columbia, commanding them and each of them to appear herein and to answer under oath each allegation contained in this complaint, and to abide by and perform such acts, orders, and decrees as the Court may make in the premises.

UNITED STATES OF AMERICA,

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Thurman Arnold, THURMAN ARNOLD,

Assistant Attorney General.

Edward M. Curran, Edward M. Curran,

United States Attorney.

Appendix to complaint

47 Exhibit No. 1-The Utzman Putent

48 United States Patent Office

CLARENCE W. UTZMAN, OF CHICAGO, ILLINOIS, ASSIGNOR TO THE UNITED STATES GYPSUM COMPANY, OF CHICAGO, ILLINOIS, A CORPORATION OF NEW JERSEY.

#### PLASTER-BOARD

1,034,746. Specification of Letters Patent. Patented Aug. 6, 1912. Original application filed June 26, 1911, Serial No. 635,284. Divided and this application filed December 16, 1911. Serial No. 666,083.

To all whom it may concern:

46.

Be it known that I, Clarence W. Utzman, a citizen of the United States, residing at Chicago, in the county of Cook and State of Illinois, have invented certain new and useful Improvements in Plaster-Board, of which the fol-

lowing is a specification.

This invention relates to a plaster board, and aims to produce a board which shall be more substantial, durable and efficient than any plaster board heretofore manufactured, which will give better results and more satisfactory service in use, and will better withstand the handling and rough usage to which all plaster board is necessarily subjected.

The present application constitutes a division of my prior application, Serial No. 635,284, filed June 26th, 1911.

My invention further aims to produce a plaster board the edges of which will be entirely inclosed by a sheet of covering material, and which will have no free or exposed edges of the covering material such as would be liable to be torn, loosened or peeled back in the handling of the board.

My invention consists in certain novel features, of constructions hereinafter described and more particularly pointed out in the claims, references being had to the accompanying drawings forming a part of this specification, whereon—

Figure 1 is a perspective view of a board embodying my invention showing certain parts broken away, and Fig. 2 is a transverse sectional view taken through the board shown in Fig. 1.

Referring to the drawings it will be observed that, upon a large covering sheet 10, which may be of any fibrous material, there is disposed the body of the board con-

sisting of a plurality of layers of plastic material 11 alternating with layers of fibrous material 12 which are of slightly less width than the said layers of plastic material. The layers of plastic material in extending on either side beyond the layers of fibrous material flow together forming a homogeneous board reinforced by said fibrous layers. The sides of the sheet 10 are turned upwardly at 13 to form a covering for the side edges of the board and at the top of the board the edges 14 are turned inwardly over the board to form inturned laps 15. A top covering 16 of less width than the width of the plaster board is superimposed upon said inturned laps and the whole board is then subjected to pressure which forces the upper face of the top covering down flush with the upper faces of the inturned laps 15 and causes the plastic material at the top of the board to flow over the inturned laps between their inner edges and the edges of the covering whereby the edges of the covering are securely fastened or scaled down. A smooth upper surface is thereby obtained and all of the edges of the covering material are securely sealed and the corners of the board are left smooth without any projecting edges of covering such as are left in the construction of boards in which the upper layer of covering extends flush with or beyond the side edges of the completed board. In the present invention no exposed or raw edges are left to be caught and drawn or peeled back and the strength, durability and life of the board is manifestly materially increased.

It will be evident from the foregoing that the completed board is inclosed on both sides and both edges and that the edges of the top sheet of covering material are spaced from the corners of the board so that they will not be cut or peeled back during the handling of the board, and furthermore these edges are securely fastened or sealed down by the plastic material disposed over the inturned portions of the lower covering sheet 10. No exposed plaster is presented and by reason of the fact that all portions of the board are inclosed a uniform absorption of moisture from the finished plaster applied to the wall at the joints between the plaster boards and over their entire surfaces will take place. The side edges of the plaster board are straight and true. They require no cutting or trimming, resulting consequently in a saving of paper, plaster and labor. The completed board presents a finished and pleasing appearance and the edges are smooth to handle and strong so that the board will not be fractured or injured by driving nails

there-through.

While I have described in detail my improved board, it will be obvious that various minor mechanical changes in its construction may be resorted to without departing from the spirit or sacrificing any of the advantages of the invention.

I claim:-

1. A plaster board comprising a body, a covering of fibrous material adhering to one face of the body folded to inclose an edge of the body and overlie a portion of the opposite face thereof, and a covering of fibrous material for said opposite face of the body overlying said folded-over portion of the first mentioned covering but having its edge spaced from the edge of the board.

2. A plaster board comprising a body, a covering of fibrous material adhering to one face of the body folded to inclose opposite edges of the body and overlie the margins of the opposite face, and a covering of fibrous material for said opposite face of the body overlying said folded-over portions of the first mentioned covering and having

its edges spaced from the edges of the board.

3. A plaster board comprising a body, a covering of fibrous material for one face of the body folded to inclose an edge of the body and overlie the margin of the opposite face, and a covering of fibrous material for said opposite face having an edge overlying the folded over portion of the first-mentioned covering and pressed inwardly of the body depressing the edge of the first mentioned covering to afford protection for the said edge of the second-mentioned covering.

4. A plaster board comprising a body, a covering of fibrous material for one face of the body folded to inclose an edge of the body and overlie the margin of the opposite face and a covering of fibrous material for said opposite face overlying the folded over portion of the first mentioned covering, a part of the material of the body being disposed between the folded over edge of the first mentioned covering and the overlying edge of the second mentioned

covering to secure said edges together.

CLARENCE W. UTZMAN.

Witnesses:

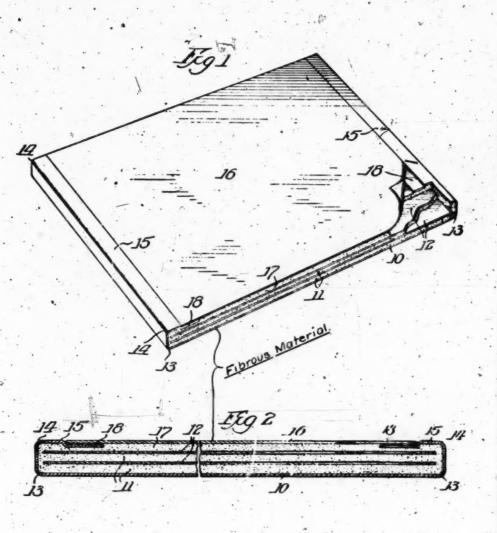
IRA J. WILSON, M. A. KIDDIE. 50

C. W. UTZMAN.

PLASTER BOARD.

1,034,746.

Patented Aug. 6, 1912.



Witnesses: Ser Sanson

Blazenett (Ityman By Kuthumun Self-Julis)

#### 52 LICENSE AGREEMENT

This agreement executed in duplicate this 29th day of July, 1926, by and between the United States Gypsum Company, an Illinois corporation of Chicago, Illinois, hereinafter referred to as "Licensor" and The Beaver Products Company, Inc., a New York Corporation of the Town of Tonawanda, State of New York, hereinafter referred to as "Licensee," witnesseth:

Whereas, Licensor is the owner of the entire right, title and interest in, to and under Letters Patent of the United States, No. 1,029,328, dated June 11th, 1912, and No. 1,034,746, dated August 6th, 1912, (hereinafter called the "Utzman Patents"), and is also the owner of the entire right, title and interest in, to and under the Letters Patent and applications for Letters Patent of the United States set forth in Exhibit "A" attached hereto and made a part hereof, and any and all Letters Patent which may be granted therefor or thereupon; and

Whereas, heretofore said Utzman patents have been adjudicated by the United States District Court for the Northern District of Illinois, Eastern Division, and by the United States Circuit Court of Appeals for the Seventh Circuit (258 Fed. 647; 270 Fed. 542; 290 Fed. 798; 290 Fed. 800; see also 263 U.S. 713), and said courts have decreed that said Utzman patents are valid and were infringed by the defendants in the cases so reported, and in the decision of the said District Court rendered on or about July 21, 1925, and not yet reported, by reason of the making,

using and selling of plaster board or gypsum wallboard having protected edges, and said District 53 Court has ordered perpetual injunctions and ac-

countings against said defendants; and

Whereas, Licensee recognizes and admits the validity and scope of said Utzman patents and admits that Licensee has heretofore infringed upon the same, and the Licensor has a substantial claim against Licensee for damages and profits because and on account of said infringement, and both Licensor and Licensee have expended or will be compelled to expend large sums of money in patent litigation in respect of said infringement, and such litigation has been, or will be otherwise costly and expensive to both of said parties who are therefore desirous of making a full and

complete settlement of their controversies and of avoiding

further litigation; and

Whereas, the parties hereto have agreed to settle said claim by the payment to the Licensor by the Licensee, of a sum of money in cash and an amount equivalent to five per cent. (5%) of Beaver Company's selling price of all plaster board or gypsum wallboard manufactured and sold by it until August 6, 1929, and one and one-half per cent. (1½%) of such selling price from August 6, 1929 to February 10, 1937, and the assignment to Licensor of certain Letters Patent and applications for Letters Patent, and the granting of this License to the Licensee.

Now, therefore, in consideration of the sum of One Dollar (\$1.00) and other good and valuable considerations, the receipt whereof is hereby acknowledged, the parties

hereto do hereby agree as follows, to-wit:

1. Licensor has agreed to and does hereby give and grant unto Licensee, an indivisible and non-exclusive right, license and privilege of using the processes, and making and using the machines and/or inventions set forth and claimed in said Utzman Patents, and in any and all of said patents or applications for letters patent described in said Exhibit "A", at any and all factories now or hereafter owned and/or operated or controlled by Licensee or any subsidiary, associated or affiliated company, and of manufacturing at any such place or places, selling and/or using plaster board or gypsum wallboard embodying the inventions and improvements set forth and claimed in said Utzman patents and said patents and applications for letters patent described in Exhibit "A", until the 10th day of February, 1937, the date of expiration of Patent No. 1,330,413, mentioned in said Exhibit "A".

It is expressly agreed and understood that the indivisible and non-exclusive right, license and privilege aforesaid is granted upon condition that the Licensor shall have, and it hereby reserves the right to determine and fix at any time, and to change from time to time during the term of said Utzman Patent number 1,034,746 the minimum price or prices (not more, however, than the then prevailing market price or prices) at which the Licensee shall sell any plaster board or gypsum wallboard manufactured by Licensee embodying the improvements set forth and claimed in said Utzman Patent number 1,034,746, and in case it shall exercise the right so reserved it shall first serve written notice of its intention so to do upon Licensee, accompanied with a statement of the price or prices at which the

Licensee shall sell said patented product, and thereafter shall give to the Licensee written or telegraphic

the Licensee expressly covenants and agrees that it will not at any time during the term of said Utzman Patent number 1,034,746, after the receipt of such notice, directly or indirectly sell or offer for sale, any plaster board or gypsum wallboard embodying the improvements set forth and claimed in said Utzman Patent number 1,034,746 at a price or prices less than that stated by the Licensor in said notice, or in any such written or telegraphic notice of a change in such price or prices. It is expressly understood and agreed that this provision of the said License shall apply only to the said Utzman Patent number 1,034,746, and shall not apply to any of said other Letters Patent.

2. The Licensee further agrees to pay to the Licensor, in settlement and discharge of the said claim, and for the right, license and privilege of manufacturing, using and/or selling plaster board or gypsum wallboard, and for the privilege of using the processes and making and using the machines and/or inventions; embodying the inventions and improvements set forth and claimed in said Utzman Patents and in any and all of said patents and applications for letters patent described in Exhibit "A", an amount (hereinafter for convenience referred to as a license fee or royalty) equivalent to five per cent. (5%) of the selling price of the Licensee, of all plaster board or gypsum wallboard of every kind, manufactured and sold by Licensee between the date hereof and August 6, 1929, the date of the expiration of said Utzman Patent No. 1,034,746, and thereafter an amount equivalent to one and one-half per cent. (1½%) of the selling price of the Licensee, of all such plaster board or gypsum wallboard, from August 6, 1929 until February 10, 1937, the date of the expiration of said patent No. 1,330,413.

3. It is expressly understood and agreed that the said License shall be personal to the Licensee and that the same or any right therein or thereunder shall not be sold, assigned or transferred without the written consent of the Licensor or transferred by operation of law, except that the same may be assigned to any successor or subsidiary corporation of Licensee, and except that in the event of the appointment of a receiver or receivers for the purpose of conserving the business and assets of Licensee, such receiver or receivers shall succeed to all of Licensee's rights under said license and under this agree-

ment.

Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of all plaster board and gypsum wallboard manufactured, and sold by it, and agrees that on or before the 20th day of each and every calendar month it will render unto Licensor true written returns, verified under oath by an officer or other agent of Licensee; setting forth the quantity of all plaster board and gypsum wallboard manufactured and sold by it during the preceding calendar month, together with the price or prices at which the same was sold, such written returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor, on or before the 20th day of each calendar month, at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all of said plaster board and gypsum wallboard manufactured and sold by it during the next preceding calendar month.

5. Licensor, or its duly authorized representative shall have the right at all reasonable times during business hours to inspect the books of account and records of Licensee referred to in the next preceding paragraph hereof, including all records of every kind showing the quantity of said plaster board and gypsum wallboard manufactured and sold by it, the price or prices at which the same was sold, and to make copies thereof and memo-

randa therefrom.

6. Licensee agrees that all plaster board or gypsum wallboard manufactured and sold by it embodying the claims of any of said patents shall be distinctly marked with the word "patented", together with the dates of the Utzman patents, and the dates of any other patents which Licensor may properly specify, and in connection with the said markings it will further mark said patented product with the words "Licensed under the above Letters

Patent", which markings shall be plainly visible.
7. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products who do not or may not manufacture gypsum wallboard or plaster board but who desire or may desire to have gypsum wallboard or plaster board manufactured for them, it is understood and agreed that Licensee may manufacture gypsum wallboard or plaster board embodying the inventions and improvements set forth and claimed in said Letters Patent, for any such other manufacturer; provided, however, that the said license fee or royalty to be paid to Licensor as hereinbefore provided shall be based upon all gypsum wallboard and plaster board manufactured for such other manufacturer and upon the regular

selling price of Licensee of such plaster board or gypsum wallboard to its regular dealer trade at the time of such sale, and shall not be based upon the price at which plaster board or gypsum wallboard is sold by Licensee to such other manufacturer.

8. Licensee expressly covenants and agrees that all of said patented product sold by it and commonly known in the trade as "seconds" shall be plainly invoiced as seconds and shall be plainly marked with a visible red stamp or label firmly fixed on each of said boards showing the word

"seconds" in letters at least three inches in height.

9. It is expressly understood and agreed that the patented product manufactured and sold hereunder shall include all board having a protected edge, it being recognized by the parties hereto that any board manufactured by Licensee having a protected edge is within the scope of

said Utzman patents Nos. 1,029,328 and 1,034,746.

After the expiration of said Letters Patent No. 1,034,746 and until the expiration of Letters Patent No. 1,330,413, it is expressly understood and agreed that the patented product manufactured and sold hereunder shall include all board having a protected edge, the parties hereto agreeing hereby that any and all board having a protected edge is within the claims or is manufactured according to the processes or by the use of machines embodying the claims either of said Letters Patent No. 1,330,413, or of one or more of the other of said letters patent listed in Exhibit "A" hereto, under which the aforesaid indivisible and non-exclusive right, license and privilege is granted.

 As one of the considerations for the indivisible and non-exclusive license herein and hereby granted,

Letters Patent, granted and to be granted, forming the subject-matter of this license, throughout the respective lives of the said Letters Patent and each of them, and agrees that it will not at any time before or after the expiration or termination of this license, directly or indirectly, by itself, through or together with another or others, contest the validity of either or any of said Letters Patent or the title thereto of Licensor, or question in any way the prima facie scope of either or any of said Letters Patent, or the priority, novelty or patentability of the subject-matter of any of the said applications for letters patent.

11. In the event that Licensee shall at any time neglect. fail or refuse to keep or perform any of the conditions and agreements herein to be by Licensee kept and performed, then Licensor, at its election, may serve upon Licensee notice of intention to terminate the license herein granted. which notice shall specify the alleged neglect, failure or refusal; and if, within thirty (30) days from the date of delivery of said notice, Licensee shall not keep or perform the conditions and agreements specified in said notice, then said license and all rights acquired by Licensee hereunder shall be and become cancelled and terminated without the necessity of any court action; provided, however, that Licensee shall not be relieved thereby from paying to Licensor any license fees or royalties or any other obligations accrued hereunder at the time of such termination. In case at any time Licensee shall commit any act of bankruptcy, then the license hereunder shall immediately be

and become cancelled and terminated, but Licensor shall not thereby be prevented from collecting all. license fees or royalties and other obligations accrued hereunder at the time of such termination. Failure on the part of Licensor to notify Licensee of a breach of this license contract or to terminate said license because of such breach shall not constitute a waiver of Licensor's right to terminate said license in accordance with the provisions of this paragraph. Licensor may specifically enforce this contract or any of the terms, conditions and covenants hereof, by injunction or in such other manner as may be provided by law.

12. Any notice to be given under the terms hereof may be served upon the Licensee by mailing the same to the Licensee, postage prepaid, addressed to it at its last known principal office, and the deposit of any such notice in the United States mails, postage prepaid and so addressed, shall constitute service of said notice upon the Licensee.

13. It is understood and agreed that if at any time during the term hereof the Licensee shall, in the judgment of the Licensor, suffer substantial detriment by reason of any infringement upon the part of any person or persons of the said patents, whether now or hereafter issued, under which this license is granted, the Licensor will afford the Licensee such reasonable protection as in the judgment of the Licensor shall be necessary or proper; and in case the Licensor shall grant to any such infringer, or to any other person, any license under said patents upon terms more

favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license on the same terms.

14. The terms "plasterboard" and "gypsum wall board" shall be understood to mean all board by whatever name called having the structural characteristics of plasterboard or gypsum wallboard, irrespective of

the purpose for which the same may be sold or used.

15. This license and all of the covenants and agreements hereof shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, but nothing in this paragraph shall be construed to permit an assignment hereof by the Licensee except as hereinabove specifically provided.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the day and year first

above written.

UNITED STATES GYPSUM COMPANY,

By S. L. AVERY,

Its President.

Attest:

GEO. S. GLYNN, Asst. Secretary.

THE BEAVER PRODUCTS COMPANY, INC.,
By A. S. BLAGDEN,
Its President.

Attest:

E. H. LEICHMONT, Secretary.

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Exhibit "A" to agreement

Utzman patent No. 1,330,413. Application filed September 3, 1918, granted February 10, 1920, expires February 10, 1937.

Birdsey patent No. 1,358,508. Application filed January 2, 1920, granted November 9, 1920, expires November

9, 1937.

Utzman patent No. 1,383,249. Application filed August 13, 1918, granted June 28, 1921, expires June 28, 1938. Birdsey patent No. 1,383,254. Application filed July 29, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,255. Application filed January 2, 1920, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,384,298. Application filed August 19, 1920, granted July 12, 1921, expires July 12, 1938.

Birdsey patent No. 1,395,031. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938. Birdsey patent No. 1,395,032. Application filed January

Birdsey patent No. 1,395,032. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938. Birdsey patent No. 1,406,967. Application filed January

3, 1921, granted February 21, 1922, expires February 21, 1939.

Birdsey patent No. 1,427,939. Application filed January 3, 1921, granted September 5, 1922, expires September 5, 1939.

63 Birdsey patent No. 1,428,624. Application filed January 2, 1920, granted September 12, 1922, ex-

pires September 12, 1939.

Brookby patent No. 1,489,693. Application filed September 25, 1922, granted April 8, 1924, expires April 8, 1941.

Birdsey patent No. 1,514,827. Application filed October 6,1921, granted November 11, 1924, expires November 11,

1941.

Birdsey patent No. 1,515,380. Original application filed January 2, 1920, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,518,243. Application filed September 22, 1922, granted December 9, 1924, expires De-

cember 9, 1941.

Birdsey patent No. 1,525,715. Application filed January 2, 1920, granted February 10, 1925, expires February 10, 1942.

Birdsey patent No. 1,526,307. Application filed October 10, 1921, granted February 10, 1925, expires February 10, 1942.

Utzman patent No. 1,540,045. Application filed March

14, 1923, granted June 2, 1925, expires June 2, 1942.
Birdsey patent No. 1,558,459. Application filed October

4, 1922, granted October 27, 1925, expires October 27, 1942. Birdsey patent No. 1,561,635. Application filed January 3, 1921, granted November 17, 1925, expires November

17, 1942.

64

Birdsey application Serial No. 437,062, filed Jan-

uary 13, 1921

Birdsey application Serial No. 506,676, filed October 10, 1921.

Birdsey application Serial No. 545,231, filed March 20,

Birdsey application Serial No. 555,627, filed April 19, 1922.

Birdsey application Serial No. 583,795, filed August 23, 1922.

Moore application Serial No. 590,356, filed September 25,

Knode application Serial No. 590,358, filed September 25, 1922.

Birdsey application Serial No. 605,896, filed December

9, 1922.

Smith application Serial No. 662,359, filed September 12, 1923.

Birdsey application Serial No. 737,237, filed September

12, 1924.

Utzman application Serial No. 750,224, filed November 17, 1924.

Birdsey application Serial No. 754,927, filed December 10, 1924.

Brookby application Serial No. 50,538, filed August 17, 1925.

Birdsey application Serial No. 57,507, filed September 21, 1925.

Brookby & Absmeier application Serial No. 91,297, filed

March 1, 1926.

Armstrong patent No. 1,278,821. Application filed January 4, 1918, granted September 17, 1918,

expires September 17, 1935.

Armstrong patent No. 1,348,387. Application filed March 15, 1919, granted August 3, 1920, expires August 3, 1937; application for reissue filed June 3, 1922, Serial 565,737.

Armstrong patent No. 1,367,292. Application filed July 12. 1919, granted February 1, 1921, expires February 1, 1938; application for reissue filed June 9, 1922, Serial 567,205.

Utzman patent No. 1,455,127. Application filed June 14, 1922, granted May 15, 1923, expires May 15, 1940. Utzman patent No. 1,492,588. Application filed June 14,

1922, granted May 6, 1924, expires May 6, 1941.

Williams patent No. 1,519,180. Application filed August 18, 1922, granted December 16, 1924, expires December 16, 1941.

Armstrong patent No. 1,556,575. Application filed October 1, 1921, granted October 13, 1925, expires October 13, 1942.

Armstrong patent No. 1,399,455. Application filed February 24, 1920, granted December 6, 1921, expires December 6, 1938.

Tyler patent No. 1,417,117. Application filed November 15, 1919, granted May 23, 1922, expires May 23,

1939.

Armstrong application Serial No. 310,470, filed July 12, 1919.

Utzman application Serial No. 374,833, filed April 19,

1920.

Armstrong application Serial No. 377,421, filed April 29, 1920.

Speer application Serial No. 427,044, filed November.

29, 1920.

Speer application Serial No. 427,045, filed November 29, 1920.

Mehlhope application Serial No. 473,288, filed May 28,

1921.

Utzman application Serial No. 477,371, filed June 14, 1921.

Kohler application Serial No. 482,073, filed July 2, 1921. Gustafson application Serial No. 509,366, filed December 2, 1919; renewed October 21, 1921.

Kohler, et al., application Serial No. 540,412, filed March

2, 1922.

Armstrong application Serial No. 565,737, filed June

3, 1922

Armstrong application Serial No. 567,205, filed June 9, 1922.

Utzman application Serial No. 581,361, filed August

12, 1922.

Utzman application Serial No. 581,362, filed August 12, 1922.

Williams application Serial No. 582,606, filed August

18, 1922.

Tonning application Serial No. 590,221, filed September 25, 1922.

Armstrong application Serial No. 596,983, filed October 26, 1922.

67 Speer application Serial No. 610,739, filed January 5, 1923.

Rehm application Serial No. 8,654, filed February 12,

Rehm application Serial No. 8,655, filed February 12, 1925.

Rehm application Serial No. 8,656, filed February 12,

Rehm application Serial No. 8,657, filed February 12, 1925.

Rehm application Serial No. 23,775, filed April 17, 1925.

Exhibit No. 3-The May 1929 License Agreement Between U.S.G. and Ebsary

## 69 LICENSE AGREEMENT

This agreement, executed in duplicate this 22nd day of May, 1929, by and between the United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as "Licensor," and Ebsary Gypsum Co., Inc., a New York corporation, of Newark, N. J., hereinafter referred to as "Licensee," witnesseth:

Whereas, Licensor is the owner of the entire right, title and interest in, to and under Letters Patent of the United States, No. 1,029,328, dated June 11th, 1912, and No. 1,034,746, dated August 6th, 1912 (hereinafter called the "Utzman Patents"), and Letters Patent of the United States, No. 1,358,508, dated November 9, 1920 (hereinafter called the "Birdsey Patent"), and is also the owner of the entire right, title and interest in, to and under the Letters Patent and applications for Letters Patent of the United States set forth in Exhibit "A" attached hereto and made a part hereof, and any and all Letters Patent which may be granted therefor or thereupon; and

Whereas, heretofore said Utzman Patents have been adjudicated by the United States District Court for the Northern District of Illinois Eastern Division, and by the United States Circuit Court of Appeals for the Seventh Circuit (258 Fed. 647; 270 Fed. 542; 290 Fed. 798; 290 Fed. 800; 15 Fed. (2d) 704; see also 263 U.S. 713), and said courts have decreed that said Utzman Patents are valid and were infringed by the defendants named in said suits, by reason of their making, using and selling plasterboard or gypsum wallboard having protected edges, and said District Court ordered perpetual injunctions and

accountings against said defendants; and

Whereas, said Birdsey Patent Number 1,358,508 has been adjudicated by the United States District Court for the Northern District of Ohio (In Equity Number 1621), and said Court has decreed that said Birdsey Patent is valid and was infringed by defendant in said cause by reason of its making, using and selling

plasterboard and/or gypsum wallboard having edges of the character disclosed in said patent, and said District Court ordered a perpetual injunction and accounting against defendant, which cause is now pending on appeal before the United States Circuit Court of Appeals for the Sixth Circuit (Appeal Number 5392); and

Whereas, Licensee recognizes and admits the validity and scope of said patents and is destrous of obtaining a license to use the processes and make and use the machines and/or inventions set forth and claimed in said patents and in said patents or applications for letters patent described in Ex-

hibit "A"; and

Whereas, Licensor has been unwilling to grant a license except upon the express condition that Licensee will manufacture plasterboard or gypsum wallboard only with a folded or protected edge similar to that manufactured by Licensor, so that Licensor may be protected in its own business of manufacturing and selling said patented products and realize to the fullest extent the benefits under said patents from the manufacture by said Licensee; and

Whereas, Licensor has agreed to waive the express condition aforesaid and grant the said License in consideration of the agreement of Licensee to pay to it for the license to use the processes and make and use the machines and/or inventions set forth and claimed in all of said patents and applications for letters patent the amounts hereinafter stated and upon the terms and conditions hereinafter set forth.

Now, therefore, in consideration of the sum of One Dollar (\$1.00), and other good and valuable considerations, the receipt whereof is hereby acknowledged, the parties

hereto do hereby agree as follows, to-wit:

1. Licensor has agreed to and does hereby give and grant unto Licensee, an indivisible and non-exclusive right, license and privilege of using the processes, and making and using the machines and/or inventions set forth and claimed in said Utzman Patents, and in any and all of said patents or applications for letters patent described in said Exhibit A, at the plant or factory now owned and/or operated by Licensee at Wheatland, New York, or at any other plant or factory hereafter owned or operated by it, and of manufacturing at said plant or factory and selling and/or using plasterboard or gypsum wallboard manufactured at said plant or factory and embodying the inventions and improvements set forth and claimed in said Utzman Patents and said patents and

applications for letters patent described in Exhibit A, until the 10th day of February, 1937, the date of expiration of patent number 1,330,413 mentioned in said Exhibit A, all subject to the terms and conditions hereinafter stated.

It is expressly understood and agreed that the indivisible and non-exclusive right, license and privilege aforesaid is granted upon condition that the Licensor shall have, and it hereby reserves the right to determine and fix at any time and to change from time to time during the term of said Utzman Patent Number 1,034,746 the minimum price or prices at which the Licensee shall sell any plasterboard or gpsum wallboard manufactured by Licensee embodying the improvements set forth and claimed in the said Utzman Patent 1,034,746, and in case it shall exercise the right so reserved it shall first serve written notice of its intention so to do upon Licensee, accompanied with a statement of the price or prices at which the Licensee shall sell said patented product, and thereafter shall give to the Licensee written or telegraphic notice of any change in such price

or prices, and the Licensee expressly covenants and agrees that it will not at any time during the term of said Utzman Patent Number 1,034,746, after the receipt of such notice, directly or indirectly sell or offer for sale any plasterboard or gypsum wallboard embodying the improvements set forth and claimed in said Utzman Patent Number 1,034,746 prior to the expiration thereof at a price or prices less than that stated by the Licensor in said notice or in any such written or telegraphic notice

of a change in such price or prices.

2. The Licensee further agrees to pay to the Licensor for the right, license and privilege of manufacturing, using and/or selling plasterboard or gypsum wallboard, and for the privilege of using the processes and making and using the machines and/or inventions embodying the inventions set forth and claimed in said Utzman Patents and in any and all of said patents and applications for letters patent described in Exhibit A, an amount (hereinafter for convenience referred to as a license fee or royalty) equivalent to five per cent (5%) of the selling price of the Licensee of all plasterboard or gypsum wallboard of every kind, whether patented or unpatented, manufactured and sold by Licensee between the date hereof and August 6, 1929, the date of the expiration of said Utzman Patent Number 1,034,746. and thereafter an amount equivalent to one and one half per cent (11/2%) of the selling price of the Licensee of all

such plasterboard or gypsum wallboard from August 6, 1929, until February 10, 1937, the date of the expiration of

said Patent Number 1,330,413.

3. It is further agreed that so long as this agreement shall remain in force between the parties hereto, or in case the License granted under Paragraph 1 hereof shall continue until February 10, 1937, then until the expiration

of the patent specifically described in this paragraph,
the Licensor does hereby give and grant unto Licensee an indivisible and non-exclusive right, license
and privilege of making and using the inventions set forth
and claimed in that certain patent known as the Birdsey
Plasterboard Bundle Patent Number 1,696,877, dated December 25, 1928, at the plant or factory now owned and/or
operated by Licensee at Wheatland, New York, or at any
other plant or factory hereafter owned or operated by it,
and of selling bundles of plasterboard and/or gypsum
wallboard set forth and claimed in said patent number

1,696,877, upon the terms and conditions hereinafter stated.

The Licensee agrees to pay to the Licensor for the right, license and privilege of making, using or selling the inventions set forth and claimed in said Patent Number 1.696,877, in addition to the sums hereinabove set forth, a license fee or royalty of ten cents (10¢) per thousand square feet of plasterboard and/or gypsum wallboard which is sold by it in bundles of any kind, payable at the times and in accordance with the terms of Paragraph 4 hereof. It is expressly understood that licensee in its business of manufacturing and selling plasterboard and/or gypsum wallboard will use only said bundle set forth and claimed in said Patent Number 1,696,877 and will not use any other bundle or method of bundling plasterboard during the term of said license.

4. It is expressly understood and agreed that the license herein granted shall be personal to the Licensee and that the same or any right therein or thereunder shall not be sold, assigned or transferred without the written consent

of the Licensor or transferred by operation of law.

It is expressly understood that the Licensee shall not discontinue its business of manufacturing and selling plasterboard and/or gypsum wallboard until the Licensor shall

have received the full payment of all of the amounts 74 agreed to be paid to it hereunder by the Licensee, nor shall this license be assigned to any company or companies acquiring the capital stock or assets of Licensee, or to any company resulting from any merger or consolutation between Licensee and any other company, nor shall any such merger, consolidation or acquisition affect any claim which Licensor has against Licensee or against any such other company for infringement of its said patents; provided, however, that this license may, with the written consent of the Licensor, be assigned to any company holding a similar license from Licensor upon the express assumption by such company of all claims of Licensor against Licensee and of the agreements and obligations

of the Licensee herein contained.

5. Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of all plasterboard and gypsum wallboard manufactured and sold by it, as well as a separate record of all plasterboard and/or gypsum wallboard sold by it in bundles, and agrees that on or before the 20th day of each and every calendar month it will render unto Licensor true written returns, verified under oath by an officer or other agent of Licensee, setting forth the quantity of all plasterboard and gypsum wallboard manufactured and sold by it during the preceding calendar month, and the quantity thereof put up and sold by it in bundles, together with the price or prices at which the same was sold, such written returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor, on or before the 20th day of each calendar month, at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all of said plasterboard and gypsum wallboard manufactured and sold by it during the next preceding calendar month.

6. Licensor, or its duly authorized representative,
shall have the right at all reasonable times during
business hours to inspect the books of account and
records of Licensee referred to in the next preceding paragraph hereof, including all records of every kind showing
the quantity of said plasterboard and gypsum wallboard
manufactured and sold by it, and the quantity thereof put
up and sold by it in bundles, the price or prices at which
the same was sold, and to make copies thereof and memoranda therefrom.

7. Licensee agrees that all plasterboard or gypsum wall-board manufactured and sold by it embodying the claims of any of said patents shall be distinctly marked with the word "PATENTED", together with the dates of the Utzman Patents, and the dates of any other patents which

Licensor may properly specify, and in connection with the said markings it will further mark said patented product with the words, "Licensed under the above Letters Patent,"

which markings shall be plainly visible.

8. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products, or. jobbers of such products, who do not or may not manufacture gypsum wallboard or plasterboard but who desire or may desire to have gypsum wallboard or plasterboard manufactured for them, it is understood and agreed that Licensee may with the written consent of Licensor manufacture gypsum wallboard or plasterboard embodying the inventions and improvements set forth and claimed in said Letters Patent, for any such other manufacturer and or jobber; provided, however, that the said license fee or royalty to be paid to Licensor as hereinbefore provided shall be based upon all gypsum wallboard, or plasterboard manufactured for, and sold and invoiced to, such other manufacturer and/or jobber and upon the regular selling price of Licensee of such plasterboard or gypsum wallboard to its regular dealer trade at the time of such sale and invoice, and shall not be based upon the

76 price at which plasterboard or gypsum wallboard is soid and invoiced by Licensee to such other manufacturer or jobber. The Licensee shall have no right to manufacture and sell any plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in any of said letters patent to other manufacturers or jobbers or other wholesale distributors

of such products, without the written consent of Licensor.

It is understood that the selling price of the Licensee wherever mentioned in this instrument means the selling price to its regular dealer trade, and in case of the sale of any of said plasterboard or gypsum wallboard, whether patented or unpatented, for a price less than said price to Licensee's regular dealer trade, Licensee shall account to the Licensor in the payment of royalties hereunder at its regular dealer price; provided, however, that nothing herein contained shall give the Licensee the right to sell any of said patented products upon which the Licensor shall have fixed and determined the price thereof in accordance with the terms hereof at less than such price.

9. The Licensee and the Licensor each expressly covenants and agrees that all of said patented product sold by it and commonly known in the trade as "seconds" shall be plainly invoiced as seconds and shall be plainly marked

with a visible red stamp or label firmly fixed on each of said boards showing the word "seconds" in letters at least

three inches in height.

10. It is expressly understood and agreed that the patented product manufactured and sold hereunder shall include all board having a protected edge, it being recognized by the parties hereto that any board manufactured by Licensee having a protected edge is within the scope of said Utzman Patents Numbers 1,029,326 and 1,034,746.

After the expiration of said Letters Patent number 1,034,746 and until the expiration of Letters Patent Number 1,330,413, it is expressly understood and agreed that the patented product manufactured and sold hereunder shall include all board having a protected edge, the parties hereto agreeing hereby that any and all board having a protected edge is within the claims or is manufactured according to the processes or by the use of machines embodying the claims either of said Letters Patent Number 1,330,413, or of one or more of the other of said Letters Patent listed in Exhibit "A" hereto, under which the aforesaid indivisible and non-exclusive right, license-

and privilege is granted.

11. As one of the considerations for the indivisible and non-exclusive license herein and hereby granted, Licensee hereby acknowledges the validity of the Letters Patent, granted and to be granted, forming the subject-matter of this license, throughout the full term of this contract, unless the same shall be cancelled or terminated prior thereto by reason of the default of the Licensor hereunder, and agrees that it will not at any time before February 10th, 1937, or the earlier termination of the license by reason of the default of the Licensor hereunder, directly or indirectly, by itself, through or together with another or others, contest the validity of either or any of said Letters Patent or the title thereto of Licensor, or question in any way the prima facie scope of either or any of said Letters Patent, or the priority, novelty or patentability of the subject-matter of any of the said applications for letters patent.

12. In the event that either party shall at any time neglect, fail or refuse to keep or perform any of the conditions and agreements herein to be by it kept and performed, then

the other party, at its election, may serve upon the party in default written notice of intention to terminate this Agreement, which notice shall specify the alleged neglect, failure or refusal, and if within thirty

(30) days from the date of delivery of said notice, the party in default shall not cure the default specified in said notice, then the other party may cancel and terminate this Agreement, by notifying the party in default, in writing, of its election so to do, without the necessity of any court action; provided, however, that neither party shall be relieved thereby from any liability accrued at the time of such termination. In case at any time the Licensee shall be adjudged a bankrupt, then the license hereunder shall immediately be and become cancelled and terminated, but the Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the timeof such termination. The waiver of any breach by either party shall not be interpreted as constituting a waiver of any further breach or breaches. Either party may specifically enforce this contract or any of the terms, conditions and covenants hereof by injunction or in such other manner as may be provided by law.

13. Any notice to be given under the terms hereof may be served upon the Licensor or the Licensee by mailing the same to the Licensor or Licensee, postage prepaid, addressed to it at its last known principal office, and the deposit of any such notice in the United States mails, postage prepaid and so addressed, shall constitute service of

notice hereunder.

14. It is sunderstood and agreed that if at any time during the term hereof the Licensee shall, in the judgment of the Licensor, suffer substantial detriment by reason of any infringement upon the part of any person or persons

of the said patents, whether now or hereafter issued,
under which this license is granted, the Licensor
will afford the Licensee such reasonable protection
as in the judgment of the Licensor shall be necessary or
proper; and in case the Licensor shall grant to any such
infringer, or to any other person, any license under said
patents upon terms more favorable than those granted
hereunder to this Licensee, then it will grant to this Licensee a license of the same terms.

15. The terms "plasterboard" and "gypsum wallboard" shall be understood to mean all board by whatever name called having the structural characteristics of plasterboard or gypsum wallboard, irrespective of the purpose for which

the same may be sold or used.

16. This license and all of the covenants and agreements hereof shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, but noth-

ing in this paragraph shall be construed to permit an assignment hereof by the Licensee except as hereinabove

specifically provided.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the day and year first above written.

UNITED STATES GYPSUM COMPANY,

SEAL ]

[SEAL]

By S. L. AVERY,

Its President.

JOHN E. MACLEISH, Witness.

> EBSARY GYPSUM Co., INC., By F. G. EBSARY,

> > Its President.

GEORGE N. LENCI. Witness.

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Exhibit "A" to agreement

Utzman patent No. 1,330,413. Application filed September 3, 1918, granted February 10, 1920, expires February 10, 1937.

Birdsey patent No. 1,358,508. Application filed January 2, 1920, granted November 9, 1920, expires November 9,

Utzman patent No. 1,383,249. Application filed August

13, 1918, granted June 28, 1921, expires June 28, 1938. Birdsey patent No. 1,383,254. Application filed July 29,

1918, granted June 28, 1921, expires June 28, 1938.
Birdsey patent No. 1,383,255. Application filed January

2, 1920, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,384,298. Application filed August 19, 1920, granted July 12, 1921, expires July 12, 1938.

Birdsey patent No. 1,395,031. Application filed January

2, 1920, granted October 25, 1921, expires October 25, 1938. Birdsey patent No. 1,395,032. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,406,967. Application filed January 3, 1921, granted February 21, 1922, expires February 21, 1939.

Birdsey patent No. 1,427,939. Application filed January 3, 1921, granted September 5, 1922, expires September 5,

Birdsey patent No. 1,428,624. Application filed January 2, 1920, granted September 12, 1922, expires September 12, 1939.

Brookby patent No. 1,489,693. Application filed September 25, 1922, granted April 8, 1924, expires April 8,

1941.

Birdsey patent No. 1,514,827. Application filed October 6, 1921, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,515,380. Original application filed January 2, 1920, granted November 11, 1924, expires No-

vember 11, 1941.

Birdsey patent No. 1,518,243. Application filed September 22, 1922, granted December 9, 1924, expires December 9, 1941.

Birdsey patent No. 1,525,715. Application filed January 2, 1920, granted February 10, 1925, expires

February 10, 1942.

Birdsey patent No. 1,526,307. Application filed October 10, 1921, granted February 10, 1925, expires February 10, 1942.

Utzman patent No. 1,540,045. Application filed March 14, 1923, granted June 2, 1925, expires June 2, 1942.

Birdsey patent No. 1,558,459. Application filed October 4, 1922, granted October 27, 1925, expires October 27, 1942.

Birdsey patent No. 1,561,635. Application filed January 3, 1921, granted November 17, 1925, expires November 17, 1942.

Birdsey application Serial No. 437,062, filed January

13, 1921.

Birdsey application Serial No. 506,676, filed October 10, 1921.

Birdsey application Serial No. 545,231, filed March 20,

1922.

Birdsey application Serial No. 555,627, filed April 19,

Birdsey application Serial No. 583,795, filed August

23, 1922.

Moore application Serial No. 590,356, filed September 25, 1922.

Knode application Serial No. 590,358, filed September

25, 1922.

Birdsey application Serial No. 605,896, filed December 9, 1922.

Smith application Serial No. 662,359, filed September 12, 1923.

Birdsey application Serial No. 737,237, filed September 12, 1924.

Utzman application Serial No. 750,224, filed November

17, 1924.

Birdsey application Serial No. 754,927, filed December 10, 1924.

Brookby application Serial No. 50,538, filed August 17, 1925.

Birdsey application Serial No. 57,507, filed September 21, 1925.

Brookby & Absmeier application Serial No. 91,297, filed

March 1, 1926.

Armstrong patent No. 1,278,821. Applications filed January 4, 1918, granted September 17, 1918, expires September 17, 1935.

Armstrong patent No. 1,348,387. Application filed March

15, 1919, granted August 3, 1920, expires August 3, 1937; application for reissue filed June 3, 1922, Serial 565,737. Armstrong patent No. 1,367,292. Application filed July 12, 1919, granted February 1, 1921, expires February 1, 1938; application for reissue filed June 9, 1922, Serial 567,205.

Utzman patent No. 1,455,127. Application filed June 14, 1922, granted May 15, 1923, expires May 15, 1940.

Utzman patent No. 1,492,588. Application filed June 14,

1922, granted May 6, 1924, expires May 6, 1941.

Williams patent No. 1,519,180. Application filed August 18, 1922, granted December 16, 1924, expires December 16, 1941.

Armstrong patent No. 1,556,575. Application filed October 1, 1921, granted October 13, 1925, expires October 13,

1942.

Armstrong patent No. 1,399,455. Application filed February 24, 1920, granted December 6, 1921, expires December 6, 1938.

Tyler patent No. 1,417,117. Application filed November 15, 1919, granted May 23, 1922, expires May 23, 1939.

Armstrong application Serial No. 310,470 filed July 12, 1919.

Utzman application Serial No. 374,833, filed April 19,

Armstrong application Serial No. 377,421, filed April 29, 1920.

Speer application Serial No. 427,044, filed November 29, 1920.

Speer application Serial No. 427,045, filed November 29, 1920.

Mehlhope application Serial No. 473,288, filed May 28, 1921.

Utzman application Serial No. 477,371, filed June 14, 1921.

Kohler application Serial No. 482,073, filed July 2, 1921. Gustafson application Serial No. 509,366, filed December 2, 1919; renewed October 21, 1921.

Kohler, et al., application Serial No. 540,412, Filed

March 2, 1922.

Armstrong application Serial No. 565,737, filed June 3, 1922.

Armstrong application Serial No. 567,205, filed June 9, 1922.

Utzman application Serial No. 581,361, filed August

12, 1922.

Utzman application Serial No. 581,362, filed August 12, 1922.

Williams application Serial No. 582,606, filed August

18, 1922.

Tonning Application Serial No. 590,221, filed September 25, 1922.

Armstrong application Serial No. 596,983, filed October

26, 1922.

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Speer Application Serial No. 610,739, filed January 5,

Rehm application Serial No. 8,654, filed February 12,

Rehm application Serial No. 8,655, filed February 12,

Rehm application Serial No. 8,656, filed February 12, 925

Rehm application Serial No. 8,657, filed February 12,

Rehm application Serial No. 23,775, filed April 17, 1925.

Exhibit No. 4—The Hite Patent

85 United States Patent Office

CHARLES E. HITE, OF PHILAELPHIA, PENNSYLVANIA.

HEAT-INSULATING MATERIAL AND METHOD OF MAKING SAME.

1,230,297. Specification of Letters Patent. Patented June 19, 1917. No Drawing. Application filed August 18, 1916. Serial No. 115,649.

To all whom it may concern:

Be it known that I, Charles E. Hite, a citizen of the United States, residing at Philadelphia, in the county of Philadelphia, State of Pennsylvania, have invented a new and useful Heat-Insulating Material and Methods of Making Same, of which the following is a specification.

My invention relates to an improved heat insulating material and the method of making same. The object is to provide an improved insulating material, suitable for covering steam and hot and cold water pipes, refrigerating machinery, boilers and furnaces, and for numerous other uses requiring insulation of high efficiency, which is non-combustible, durable and light in weight.

It is a well known fact that the efficiency of material used as insulation for heat or cold depends largely upon the percentage of voids or air spaces for containing dead air

in the insulating medium.

Among the best insulating mediums or materials now in use, may be mentioned hair felt, cork, carbonate of magnesia and asbestos. These materials are expensive, and

each has certain disadvantages.

The present invention consists in the production of an extremely porous substance by the use of a suitable suspending agent such as a carbo-hydrate formed into a paste with water. This liquid paste is sufficiently gelatinous in character to be capable of holding in suspension until set, a powdered material such as calcium sulfate (plaster of Paris) or other like material, whereby a greater quantity of water or other fluid can be mixed with the given quantity of plaster than would ordinarily be possible.

The significance of the invention will immediately be-

come manifest upon realizing the following facts:-

The greatest amount of water that can be actually mixed with plaster of Paris is one and one half parts water to one part of plaster. Thus the original plaster can only be increased to a total dimension or bulk of about double its original volume by mixing with water

As a result of my method one part of plaster of Paris by weight can be mixed with six parts of water by weight. This will result in a mass, formed from the same bulk of plaster, having a volume six times its original cubical

volume.

As an example of the method and the product resulting therefrom I combine 600 cubic centimeters of water, 24 grams of starch and 100 grams of calcium sulfate in the following manner: I bring to a boiling point 500 centimeters

of water; I mix thoroughly with 100 centimeters of cold water, 24 grams of starch. This mixture is poured into and thoroughly mixed with the 500 cubic centimeters of boiling water, and the boiling continued for a few minutes, thereby forming a paste. While the mixture is still het or after it has cooled, 100 grams of calcium sulfate is rapidly stirred into the liquid paste, and after becoming thoroughly mixed, the entire mass is poured into a suitable mold or molds. After the mass has become set, it is of a uniform consistency throughout, occupying approximately a little more than 600 cubic centimeters. The water is now evaporated at a temperature approximately from 200° F. to 212° F. The resulting product is extremely porous, owing to the large percentage of air cells, and is a good insulating medium, possessing considerable strength and being very light in weight.

If desired, one gram of borax or alum or other paste preservative may be added to the mixture of carbo-hydrate

and water.

This mass of carbo-hydrate, water and sulfate, is at first quite fluid, but soon sets and becomes firm. The action of the carbo-hydrate paste is to hold the particles of sulfate in suspension, preventing settling until the sulfate hardens, then on the evaporation of the water, a substance is produced full of air cells, which has proved of greater insulating efficiency, as above stated, than insulating substances composed of 85% carbonate of magnesia and 15% asbestos.

In some instances and for certain purposes it is necessary to water-proof the material. This I accomplish by adding to the paste one per cent., for example, of a vegetable or animal oil, such as linseed oil or fish oil, or mineral oil, such as petroleum, or the asphaltum residue from the distillation of crude oil. After the water has been evaporated, at a heat ranging approximately 500° F. or higher, these substances either oxidize or carbonize, as in the case of resins, asphalts or other hydrocarbons having a melting point above 60° F.

In cases where the insulating material has to stand a heat above 300° F, or a harder material is desired, such material is produced by adding to the paste one per cent., for example, of borax and one per cent, of oxid of iron. These materials tend to flux under the influence of sufficient heat, or in other words a temperature of 500° F., or over, thereby adding greatly to the strength of the article produced, or a harder material can be made by the addition to the paste of what is known as

glutrin, or sulfite pitch and subjecting the composition to a temperature of 500° F., or ever, during the process of drying.

It is to be understood that the proportions of the various

materials may be varied to suit different requirements.

The liquid mixture as described, is poured into suitable molds, allowed to set, and then is dried at a temperature ranging from approximately 212° F. to 700° F. At the higher temperatures, the starch undergoes a chemical change and is not thereafter affected by the heat from any steam pipes.

When borax and oxid of iron, Fe<sub>2</sub>O<sub>3</sub>, are added to the paste, the dried substances have been found to withstand a temperature of 1700° F. for four hours or more, without cracking or disintegrating, and it becomes even harder

than the original substance.

To the plaster of Paris may be added calcined magnesium carbonate with the result that the material produced is lighter and of slightly more efficient insulating character.

It will be understood that plaster-of-Paris and carbohydrate pasterare given in the above description, merely as examples of a suitable material and a suitable suspending agent, in order to effect the process and secure the product desired. Other substances and agents may obviously be used with similar results.

The essence of the invention, is the suspension of the particles of a suitable powdered material such as calcium sulfate, calcium hydroxid, or diatomaceous earth, by an agent, such for example as a carbo-hydrate paste, until the material is changed from a fluid or semi-fluid state to a self-sustaining and extremely porous body.

What I claim is:-

1. The method which consists in forming a fluid or semifluid mass by suspending the particles of a powdered mineral material in a previously prepared viscous liquid agent until the material becomes self-sustaining, and then evaporating the moisture, thereby producing a body provided with air cells.

2. The method which consists in associating the particles of a powdered mineral material with a previously prepared suspending agent to form a fluid mass and to hold the mineral particles in suspension until the material becomes self-sustaining, and then evaporating the moisture, thereby producing a porous body.

3. The method which consists in mixing a carbo-hydrate paste with water, and thoroughly mixing therewith calcium

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sulfate to be held in suspension then allowing the mixture to set in a mold and then evaporating the moisture therefrom.

4. The method which consists in mixing plaster-of-Paris with a carbo-hydrate paste mixed with water, so that the paste will hold the plaster in suspension until it has set and then evaporating the moisture therefrom.

5. The method which consists in making a paste by mixing a carbo-hydrate with a quantity of water, and thoroughly mixing therewith calcium sulfate to be held in suspension, then allowing the mixture to set in a suitable

mold and then evaporating the moisture.

6. The method which consists in mixing a carbo-hydrate paste to which is added borax and oxid of iron, with water, and thoroughly mixing therewith calcium sulfate to be held in suspension and then allowing the mixture to set in a suitable mold.

7. A heat insulating body composed of mineral particles formed into a porous self-sustaining mass by first suspending the particles in a liquid paste until the mass has set,

and then evaporating the moisture therefrom.

8. A heat insulating body composed of mineral particles formed into a porous self-sustaining mass by first suspending the particles in a liquid paste until the mass has set in a suitable mold, and then evaporating the moisture therefrom.

CHARLES E. HITE.

87' Exhibit No. 5—The Haggerty Patent

Patented July 8, 1924. 1,500,452

United States Patent Office.

Joseph F. Haggerty, of Batavia, New York, Assignor to Universal Gypsum Company, of Chicago, Illinois, a Corporation of Delaware.

## PLASTER'WALL BOARD

No. Drawing. Application filed June 2, 1922. Serial No. 565,433.

To all whom it may concern:

Be it known that I, Joseph F. Haggerty, a citizen of the United States, residing at Batavia, in the county of Genesee, State of New York, have invented certain new and useful Improvements in Plaster Wall Board; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others

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skilled in the art to which it appertains to make and use the same.

Wall board for use in place of lath and plaster in the construction of buildings is now made with a gypsum core lined on both sides with heavy paper. The board is made in large panels usually three-eighths of an inch thick. Sawdust is sometimes mixed with the gypsum to decrease the weight of the board and also to decrease the liability to chipping when nails are driven through the board to secure it to the studding of the building. The longitudinal edges of the board may be sealed with paper as by bending up the

edges of one or both of the liners.

The gypsum while still wet and plastic is rolled into shape on the lower liner and the natural adhesiveness of the gypsum when it crystallizes or sets is relied on to secure the paper liners to the board. Unfortunately this natural adhesiveness of the gypsum is variable. It depends in large measure on the amount of moisture present in the gypsum when the plastic mass is being shaped. It depends on the amount and character of the sawdust or other foreign material added. It depends on the fibrous structure, the moisture content, the surface characteristics and the thickness of the paper liners. The result is that in regular commercial practice much material is produced in which there is not good adhesion between the paper liners and the gypsum core. Such a lack of adhesion materially reduces the strength of the board for the liners are relied on to stiffen the board and any lack of adhesion results in lines or areas of weakness. Ordinarily the defective adhesion does not become apparent until after the board has been dried in the kiln and is ready for shipment. Very often the defect does not become apparent until the board has been shipped and is ready for use by the consumer. Replacements of gypsum boards rendered defective through lack of proper adhesion of the liners is an item of large importance in regular commercial manufacture.

It is an object of the present invention to secure better adhesion of the paper liners to the gypsum through the use of an appropriate amount of carbohydrate material in the mixture, as for instance starch or the like, while the board is being made. Thus by adding cooked starch paste, for instance, to the dry gypsum the natural adhesiveness of the gypsum is augmented by the adhesiveness of the starch with the result that the liner or liners stick tenaciously. Furthermore, a larger percentage of water can be used in the mixture, when starch or other carbohydrate

is used. In the usual practice, the difficulties of securing adhesion of the liners increases with an increase in the amount of water used. While it is possible to use as high as 50% or 60% of water, in the usual process it is impracticable, because the mixture must be stirred to so near the point of setting before it is delivered to the liners that the liners will not adhere. The use of starch has other

advantages as hereinafter briefly pointed out.

The procedure followed by me in practice of the preferred embodiment of the present invention consists in adding 2 lbs. of starch to 6 lbs. of cold water to form a suspension in which the starch granules are separated one from another. The starch may be corn starch, potato starch, or equivalent gelatinizable material. This suspension is then added to 52 lbs. of water heated preferably to about the boiling point. The hot water bursts the granules of starch and cooks or gelatinizes the starch. The result is a thin and somewhat clouded liquor. 40 lbs. of dry powdered gypsum is then added to the liquor and thoroughly mixed therewith. The best way known to me for securing the desired intimate mixing is to agitate the mix thoroughly for about two minutes in a tank having a vertical rotatable shaft with blades or propellers. After this agitation, the thoroughly mixed mass in a plastic condition is ready for delivery to the board machine to be rolled out into a thin sheet in conformity with standard practice.

A paper liner suitable for use with this board may be made from ground wood fibre or from waste paper beaten to a pulp and formed into sheets, or may be made from mixtures of these. A proper liner has a ealiper of 25 points, that is to say, it is .025 of an inch in thickness. Such a paper weighs about 75 lbs. per 1000

square feet.

In the board machine the plastic gypsum and starch mixture is rolled into intimate contact with the bottom liner, and likewise with the top liner, if one is used, and some of the moisture from the gypsum soaks into the paper liner rendering it soft and plastic and facilitating the bonding of the paper to the gypsum core when the latter crystallizes or solidifies. When gelatinized starch is present in the gypsum mix as above described the starch prevents the water of the gypsum from going too freely into the paper. The chemical affinity of the starch for the water holds the moisture in the gypsum and prevents the paper from becoming mushy. A soft mushy paper greatly in-

ereases the difficulty of handling gypsum board in the

mill prior to drying.

In conformity with usual practice, the gypsum layer is formed in a continuous sheet and while still moist is cut to approximately finished dimensions. The moist sheets or panels so formed are then dried in kiln as usual at 140 to 190° F. for about 24 hours. I find it expedient to make the boards with a finished tnickness of seven-sixteenths of an inch, this being one-sixteenth of an inch thicker than the usual practice. I am able to do this and still keep the weight of the board within permissible limits because of the gelatinized starch which seems to separate the crystals of the gypsum and so yield what might be regarded as a more porous and consequently lighter board. With starch present in the proportion above mentioned the finished board seven-sixteenths of an inch thick weighs approximately 1,250 lbs. per 1000 square feet as against usual weights of 1,750 to 2,000 lbs. per 1000 square feet three-eighths of an inch thick when gypsum alone or a mixture of gypsum and sawdust is used as the core of the board. This addition to the thickness with simultaneous saving-in weight is an important commercial consideration in the transportation and marketing of this relatively heavy product.

described is easier to saw than ordinary gypsum board, presumably because of the slight separation of the gypsum crystals by the intervening starch jell, or more strictly speaking the residue of that jell. The product saws more like lumber while the material of the prior art saws much like a seft rock with resultant heavy wear on the carpenter's tools even when sawdust is present. With the boards of my present invention sawdust can be omitted entirely and yet the boards can be nailed to the studding without serious chipping or splitting of the gypsum. This result is no doubt due in part to the improved crystalline structure of the gypsum core, but is also due in part to the increased adhesion between the paper liners and the board. The paper sheet or liner is intimately bound to

The gypsum board with the starch addition as above

the surface of the gypsum not only by the crystallization of the gypsum, but also because of the adhesiveness of the starch held in the interstices of the gypsum. Furthermore the gypsum while setting has not been drained of its proper moisture content through diffusion and dissipation of the water into the paper liner where its presence serves no useful purpose and materially increases the difficulty of

handling the boards on their way to the kiln. Such a close bond between the paper and the gypsum materially reduces breakage in handling at the kiln and the finished board is stronger because use is made of the full strengthening value of the paper uniformly distributed over the entire board.

The strength of the board as above made, may be materially increased, and the tendency to breakage reduced by the addition of fiber, as for instance, asbestos fiber, wood fiber, sulfite fiber, jute and the like. The asbestos fiber is preferably in some respects, being fire-proof and of a mineral nature. When fiber, as for instance, asbestos fiber, is added to the paste and thoroughly distributed so that the fiber is completely separated, each individual fiber becomes covered with the paste, which being adhesive, causes the gypsum to adhere more tenaciously to the fiber when the board is dried.

The relative quantity of starch above indicated is the best known to me for the purpose set forth, but I am aware that the percentage can be varied to some extent without substantial sacrifice and similarly that details of the procedure of compounding the plastic mixture of gypsum with starch can be varied without departing from the spirit of my invention as defined by the appended

claims.

I claim:

1. A wall board consisting mainly of gypsum and having a paper liner, cooked starch being incorporated with the gypsum, to insure secure adhesion of said paper liner.

2. A wall board consisting mainly of gypsum and having a paper liner, cooked starch being incorporated with the gypsum in about the proportion of 2 lbs. of starch to 40 lbs. of gypsum, to insure adhesion of said paper liner.

3. A wall board consisting mainly of gypsum and having a thickness of about seven-sixteenths of an inch and having paper liners on both sides, cooked starch being uniformly distributed throughout the gypsum in about the proportions of 2 lbs. of starch to 40 lbs. of gypsum,

to secure better adhesion of said paper liners than is to be had from gypsum alone; substantially as described.

4. The method of making a paper lined gypsum board which consists in intimately mixing cooked starch with dry gypsum and then rolling into shape on a paper liner; substantially as described.

5. The method of making a paper lined gypsum board which consists in cooking starch in water, adding gypsum

thereto, thoroughly agitating and then rolling into shape

on a paper liner; substantially as described.

6. The method of making a paper lined gypsum board which consists in mixing 2 lbs. of starch with 6 lbs. of cold water to form a suspension, adding said suspension to 52 lbs. of hot water to burst the starch granules and gelatinize the starch, adding 40 lbs. gypsum, mixing thor-oughly and then rolling into shape on a paper liner; substantially as described.

7. The method of making a paper lined gypsum board which consists in mixing 2 lbs. of starch with 6 lbs. of cold water to form a suspension, adding said suspension to 52 lbs. of hot water to burst the starch granules and gelatinize the starch, adding 40 lbs. of gypsum, agitating thoroughly in a blade mixer for about two minutes and then rolling into a sheet about seven-sixteenths of an inch thick between paper liners; substantially as described.

8. A wall board consisting mainly of gypsum and having a paper liner, cooked carbohydrate being incorporated with the gypsum to insure secure adhesion of the paper liner, fiber being thoroughly distributed throughout the carbo-

hydrate to strengthen the board.

9. A wall board consisting mainly of gypsum and having a paper liner, cooked starch being incorporated with the gypsum to insure secure adhesion of the paper liner, fiber being thoroughly distributed throughout the starch to strengthen the board:

10. A wall board consisting mainly of gypsum and having a paper liner, cooked carbohydrate being incorporated with the gypsum to insure secure adhesion of said paper

11. A plaster board, or the like, comprising a body portion of plaster, mixed with a starch, product and a

covering of paper, adhering thereto.
12. A plaster board, or the like, comprising a body portion of plaster, mixed with a finely comminuted starch

product and a covering of paper adhering thereto.
In testimony whereof I affix my signature.

JOSEPH F. HAGGERTY.

91 Exhibit No. 6-The October 1929 License Agreement Between U.S.G. and Ebsary

## 92 LICENSE AGREEMENT

This agreement made this 18th day of October, A.D. 1929, by and between the United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as Licensor, and Ebsary Gypsum Co., Inc., a New York corporation, of Newark, New Jersey,

hereinafter referred to as Licensee, witnesseth, that

Whereas, Licensor is the owner of certain letters patent and applications for letters patent of the United States covering an improved gypsum wallboard and method or process of making the same, together with machines and appliances for the manufacture of such inventions which, with certain other patents, are more specifically set forth in Exhibit A attached hereto and made a part hereof; and

Whereas, Licensor was the owner of all of the right, title and interest in and under letters patent of the United States number 1,029,328 and number 1,034,746 known as the Utzman Patents, the last of which expired August 6, 1929, which said Utzman Patents were adjudicated by the United States District Court for the Northern District of Illinois, Eastern Division, and by the United States Circuit Court of Appeals for the Seventh Circuit, and were decreed by said courts as valid and having been infringed by the defendants named in said suits; and

Whereas, Birdsey Patent number 1,358,508, mentioned in said Exhibit A, was decreed by the United States District Court for the Northern District of Ohio as valid and in-

fringed by the defendant in said cause by reason of its having made, used and sold plasterboard and/or gypsum wallloard with edges of the character disclosed in said patent, and said District Court ordered a perpetual injunction and accounting against defendant,

which cause is now pending on appeal before the United States Circuit Court of Appeals for the Sixth Circuit; and Whereas, Licensor is the owner of a new process disclosed in that certain application for United States letters patent filed by Carlisle K. Roos, entitled "Cementitious Material." now pending in the United States Patent Office and covering the process of making a cellular product, which comprises forming a tenacious foam and mixing the foam with a cementitious material, and of certain other applications filed by said Roos covering specific employment of said invention, and Licensor has heretofore acquired the sole and exclusive rights in the United States of America (when gypsum is used as the main binding material) in that certain application for United States letters patent described in Exhibit A filed by Erik Christian Bayer, entitled "Methods of Manufacturing Porous Building Materials," and relating to a process broadly similar to that of said first mentioned Roos application, which said Roos and Bayer

applications are described and set forth in said Exhibit A;

Whereas, Licensor has agreed to purchase that certain Haggerty Patent number 1,500,452, dated July 8, 1924, and that certain Hite Patent number 1,230,297, dated June 19, 1917, both mentioned in said Exhibit A, subject to approval of the United States District Court for the Northern

District of Illinois, Eastern Division thereof, and other United States district courts in receivership proceedings therein pending against the present

owner of said patents; and

Whereas, gypsum wallboard or plasterboard manufactured by Licensee is made by the use of the machines or according to the processes or embodying the claims of some or all of said patents and applications for letters patent set forth in said Exhibit A, and Licensee desires to include in its manufacture the inventions and improvements set forth and claimed in said Roos and Bayer applications and said Haggerty and Hite patents, and to obtain a license from Licensor to make, use and sell the inventions and improvements set forth and claimed in all of said patents and applications for letters patent set forth in said Exhibit A throughout the full term thereof; and

Whereas, Licensor has agreed to grant said License and to make certain disclosures as to the said Roos and Bayer applications referred to in said Exhibit A, upon the terms

and conditions hereinafter stated;

Now, therefore, in consideration of the sum of One Dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged from each party to the other party, and in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto do hereby agree as follows, to-wit:

1. Licensor agrees promptly to disclose to Licensee all information and formulæ which it now has or may obtain relating to the process of making a cellular product through the formation of a tenacious foam and mixing the foam with a cementitious material, as set forth and claimed in said applications for letters patent filed by Carlisle K. Roos

and Erik Christian Bayer, in so far as the same is or may be applied to gypsum, and including all in-

formation and formulæ for the manufacture of gypsum plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said Roos and Bayer applications, together with a description of the machines or appliances which it now has for making the same. It will assist Licensee to make its plant ready for practicing said process in the manufacture of plasterboard and gypsum wallboard by furnishing without cost to Licensee the advice and instruction of Licensor's experts and information with respect to the purchase and cost of said

machines and appliances.

2. Licensor has agreed to and does hereby give and grant unto Licensee an indivisible and non-exclusive right, license and privilege of using the process or processes and making and using the machines and/or inventions set forth and claimed in any and all of said patents and/or applications for letters patent set forth in Exhibit A attached hereto in the manufacture of gypsum plasterboard and/or gypsum wallboard at the plants or factories now owned and/or operated by Licensee, or at any other plant or factory hereafter owned and/or operated or controlled by it or any subsidiary, associated or affiliated company, and of manufacturing at any such place or places, selling and using in the United States of America and the territories and possessions thereof gypsum plasterboard or gypsum wallboard manufactured at any such place or places and embodying the inventions and improvements set forth and claimed in

said patents and/or applications for letters patent described in said Exhibit A, for the full term of said letters patent or of any letters patent which may be granted for or upon any of said applications, including

any extensions and/or reissues thereof.

It is expressly understood and agreed that the indivisible and non-exclusive right, license and privilege aforesaid is granted upon condition that the Licensor shall have and it hereby reserves the right to determine and fix at any time and to change from time to time during the existence of said patents and so long as said license shall continue, the minimum price or prices at which Licensee shall sell any plasterboard or gypsum wallboard manufactured by Licensee by use of any of the machines or appliances covered by any of said letters patent and which shall embody the inventions and improvements set forth and claimed in any of said patents which are presently issued, or any of said plasterboard or gypsum wallboard manufactured by second parties and which shall embody the inventions and improvements set forth and claimed in either patent number 1,500,-452 or patent number 1,230,297, or commencing with the date when a patent shall have been granted or issued for or upon any of the said Roos or Bayer inventions and/or applications any of said plasterboard or gypsum wallboard manufactured by Licensee, the body or core of which is made according to the process set forth and claimed in any

patent granted for or upon any of said Roos or Bayer inventions and/or applications, and in case Licensor shall exercise the right so reserved, it shall first serve written notice of its intention so to do upon Licensee, accompanied with a statement of the minimum price or prices at which Licensee shall sell said gypsum plasterboard or gypsum

wallboard, and thereafter shall give to Licensee 97 written or telegraphic notice of any change in such price or prices, and Licensee expressly covenants and agrees that it will not, so long as this agreement shall continue in force and effect and after receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly, sell or offer for sale any gypsum plasterboard or gypsum wallboard manufactured by it by use of any of the machines or appliances covered by any of said patents and which during the existence thereof shall embody the inventions and improvements set forth and claimed in any of said patents which are presently issued, or any gypsum plasterboard or gypsum wallboard manufactured by second parties and which during the existence thereof shall embody the inventions and improvements set forth and claimed in either patent number 1,500,452 or patent number 1,230,297, or any gypsum plasterboard or gypsum wallboard manufactured by Licensee after a patent shall have issued upon any of the said Roos or Bayer inventions and/or applications and during the existence thereof, the body or core of which is made according to the process set forth and claimed in any patent granted for or upon any of said inventions and/or applications, at a price or prices less than that stated by Licensor in said notice or in any such written or telegraphic notice of a change in such price or prices.

Said minimum price shall not be more than that price at which Licensor determines to sell plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in said patents to its own like trade

in the same market.

3. Licensee agrees to pay to Licensor for said disclosures, information and assistance and the agreements of Licensor herein contained, and for the right, license and privilege of using the processes and making and using the machines and/or inventions in the manufacture of plasterboard and gypsum wallboard covered by said patents and applications for letters patent described in said Exhibit A, and for the privilege of manufacturing, using and/or selling plasterboard and gypsum wallboard embodying the inventions and improvements set forth and

claimed in said patents and applications for letters patent, an amount (hereinafter for convenience referred to as a license fee or royalty) equivalent to three and one-half per cent 131/2 % f of the selling price of Licensee of all plasterboard and gypsum wallboard of every kind, whether or not made by the use of said machines and/or embodying the inventions and improvements set forth and claimed in said letters patent or applications for letters patent, manufactured and sold by Licensee between the date hereof and February 10, 1937, the date of the expiration of patent number 1,330,413 mentioned in said Exhibit A, and thereafter an amount equivalent to two per cent (2%) of the selling price of Licensee of all such plasterboard and gypsum wallboard manufactured and sold by it between February 10, 1937, and July 8, 1941, the date of the expiration of said patent number 1,500,452, and thereafter an amount equivalent to one per cent (1%) of the selling price of Licensee of all such plasterboard and gypsum wallboard manufactured and sold by it between July 8, 1941, and the date of the expiration of the last to expire of any patent granted or issued for or upon any of the said Roos or Bayer applications; Provided, However, that if no

patent shall have been granted or issued for or upon any of said Roos or Bayer applications covering said process referred to in paragraph I hereof, within two (2) years from the date hereof, then commencing with the end of said two (2) year period the said license fees or royalties agreed to be paid by Licensee shall be reduced by one per cent (1%) of Licensee's said selling price until such patents shall have been granted or issued for or upon any of said Roos and Bayer applications, at which time Licensee shall again commence to pay the full amount of said license fees or royalties until the date of the expiration of the last to expire of any such patent or patents. If at the time of the execution of this contract Licensee's plant shall not be equipped to practice the process set forth and claimed in said Roos or Bayer applications in the manufacture of plasterboard or gypsum wallboard, then Licensee shall pay as such license fees or royalties two and one-half per cent (21/2%) of said selling price between the date hereof and January 1, 1930, or such earlier date as Licensee shall make its plant ready to practice said process in the manufacture of said board, and the payment of three and one-half per cent (31/2%) of said selling price and said period of two (2) years in this paragraph mentioned shall commence on January 1, 1930, or such earlier date as Licensee shall have made its plant ready as aforesaid. The amount of one

per cent (1%) of said selling price included in said royalties or license fees is the amount agreed to be paid by Licensee for the use of said Haggerty and Hite patents,

Licensee's selling price shall mean the delivered selling price of Licensee, less freight paid by the customer and less

regular cash discounts allowed by Licensee. 4. It is further agreed that so long as the license provided for in paragraph 2 hereof shall remain in force between the parties hereto, or in case the li-100 cense granted under paragraph 2 hereof shall expire before the expiration of the patents specifically described in this paragraph, and the said license granted under paragraph 2 shall continue in force between the parties hereto for the full term of the last to expire of any of said patents described in said Exhibit A, or of any patent or patents granted for or upon any application described in said Exhibit A, then until the expiration of the patents specifically described in this paragraph, Licensor does hereby give and grant unto the Licensee an indivisible and non-exclusive right, license and privilege of making and using the inventions set forth and claimed in those certain patents known as the Birdsey Plaster-Board Bundle Patent number 1,696,877, dated December 25, 1928, Utzman Patent number 1,724,740 dated August 13, 1929, Birdsey Patent number 1,730,113 dated October 1 1929, and applications for letters patent serial numbers 329,581 filed December 31, 1928, and 296,354 filed July 30, 1928, and any patent which may be granted for or upon said applications, including any extensions and/or reissues thereof, at the plants or factories now owned or operated by Licensee or at any other plant or factory hereafter owned and/or operated and controlled by Licensee or any subsidiary, associated or affiliated company of Licensee, and of selling or using bundles of plasterboard and/or gypsum wallboard put up or bundled by Licensee at any such place or places according to the claims set forth and claimed in the said patents and applications for letters patent in this paragraph described, upon

Licensee agrees to pay to Licensor for the right, license and privilege of making, using or selling the inventions set forth and claimed in said patents and applications in the next preceding paragraph described, in addition to the sums, hereinabove set forth, an amount thereinafter referred to as a license fee or royalty) equivalent to ten cents per one thousand (1,000) square feet of plaster-10e1

the terms and conditions hereinafter stated.

beard and/or gypsum wallboard which is sold by Licensee in bundles of any kind, whether or not the bundles shall be made according to the claims

'set forth and claimed in said patents; which said license fee or royalty shall be payable at the times and in accordance with the terms of paragraph 6 hereof. The term "bundle" shall not include unbundled material wired or strapped for purpose of transportation or unbundled material shipped for export or coastwise trade in fiber, wooden or other crates.

5. It is expressly understood and agreed that the license herein granted shall be personal to the Licensee, and that the same or any right herein or thereunder shall not be sold or assigned or transferred without the written consent of Licensor, or transferred by operation of law; Provided. However, that the same may be assigned by Licensee to any company acquiring all the assets and business or, all of the capital stock of Licensee, on condition that Licensee shall first obtain an agreement in writing from any such assignee agreeing to assume all of the obligations of Licensee under this agreement and to be bound by all of the terms and conditions hereof and shall deliver such agreement to Licensor. Licensee agrees not to sell all of its assets and business or all of its capital stock or to transfer and convey its plasterboard and/or wallboard business, or its assets used in connection therewith, without requiring the purchaser or purchasers thereof to assume, in writing, all of the obligations of Licensee hereunder, and to agree to be bound by all of the terms and conditions of this contract, and deliver such agreement to Licensor.

6. Licensee agrees to keep separate full and accurate books of account and records showing the exact

102 quantity of all plasterboard and gypsum wallboard manufactured and sold by it, as well as a separate record of all plasterboard and/or gypsum wallboard sold by it in bundles, and agrees that on or before the twentieth day of each calendar month it will render unto Licensor true written returns verified under oath by an officer or other agent of Licensee, setting forth the quantity of all plasterboard and/or gypsum wallboard manufactured and sold by it during the preceding calendar month and the quantity thereof put up and sold by it in bundles, together with the price or prices at which the same was sold and is to be accounted for hereunder, such written returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor on or before the 20th day of each calendar month at the office of Licensor at Chicago. Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement

on account of all said plasterboard and/or gypsum wallboard manufactured and sold by it and put up and sold by it in bundles during the next preceding calendar month.

7. Licensor, or its duly authorized fepresentative, shall have the right at all reasonable times during business hours to inspect the books of account and records of Licensee referred to in the next preceding paragraph hereof, including all records of every kind showing the quantity of said plasterboard and gypsum wallboard manufactured and sold by it and the quantity thereof put up and sold by it in bundles and the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom; Provided, However, that if at the time of any such examination Licensee shall request it in writing, then such examination shall be made by a certified public accountant agreed upon between the parties hereto, in

which event the expense thereof shall be borne
103 equally by both parties. If the parties at any such
time shall not agree upon the certified public accountant to make such examination, then Licensor shall
name three certified public accountants of good standing
not directly or indirectly employed by it or in any other
way connected with it, and if Licensee shall not accept
any one of them, then Licensor shall have the right to make

such examination itself,

8. Licensee agrees that all plasterboard or gypsum wallboard manufactured and sold by it embodying the claims of any of said patents and/or applications for letters patent shall be distinctly marked with the word "PAT-ENTED" and/or "PATENT APPLIED FOR," as the case may be, together with the numbers of any of said patents or applications specified by Licensor, the claims of which may be embodied in said plasterboard or gypsum wallboard, and in connection with said marking Licensee will further mark said board with the words "LICENSED UNDER THE ABOVE LETTERS PATENT" and for "LI-CENSED UNDER PENDING APPLICATIONS FOR LETTERS PATENT," as the case may be, which marking shall be plainly visible. Licensee further agrees that all bundles put up and sold by it embodying the claims of any of said patents numbers 1,696,877, 1,724,740 and 1,730,113 and/or any of said applications serial numbers 329,581 and 296,354 shall be similarly marked together with the numbers of said bundle patents and for applications.

9. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products,

jobbers or other wholesale distributors of such products, who do not or may not manufacture gypsum wallboard or plasterboard but who desire or may desire to have gypsum wallboard or plasterboard manufactured for them, it is understood and agreed that Licensee may manufacture for jobbers (being those who do not manufacture but buy and sell plasterboard or gypsum-wallboard in straight

cars or in mixed cars with other building material and who do not sell at retail) gypsum wallboard or plasterboard embodying the inventions and improvements set forth and claimed in said letters patent or in any letters patent after the same shall have been issued, granted for or upon any of the said application and may with the written consent of first party manufacture for any such other manufacturer or other wholesale distributor, gypsum wallboard or plasterboard embodying the said inventions and improvements; Provided, However, that the said license fee or royalty to be paid to Licensor as hereinbefore. provided shall be based upon all gypsum wallboard and plasterboard manufactured for and sold and invoiced to such other manufacturer, jobber or wholesale distributor and upon the regular selling price of Licensee of such plasterboard or gypsum wallboard to its regular dealer trade at the time of such sale and invoice, and shall not be based upon the price at which plasterboard or gypsum wallboard is sold and invoiced by Licensee to such other manufacturer, jouber or wholesale distributor. Nothing hereinbefore contained in this agreement shall be construed to give Licensee the right to manufacture gypsum plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in any of said letters patent or in any letters patent after the same shall have: been granted for or upon any of said applications for said other manufacturers or wholesale distributors and to sell the same, without the written consent of Licensor.

10. Licensee covenants and agrees that all of said gypsum plasterboard and gypsum wallboard manufactured and sold by it embodying the inventions and improvements set forth and claimed in any of said Letters patent or patents issued upon any of said applications and commonly known

in the trade as "seconds" shall be plainly invoiced as "seconds" and shall be plainly marked with a visible red stamp or label firmly fixed on each of said boards showing the word "seconds" in letters at least three inches in height.

11. As one of the considerations for the indivisible and non-exclusive license herein and hereby granted, Licensee

hereby acknowledges the validity of said letters patent or of any letters patent which may be granted or issued for or upon said applications, forming the subject-matter of said license so long as said license shall remain in full force and effect, and agrees that it will not at any time during the existence of said license, directly or indirectly, by itself, through or together with another or others; contest the validity of either or any of said letters patent or

the title thereto of Licensor.

12. In the event that either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements herein to be kept by it and performed, then the other party, at its election, may serve upon the party in default written notice of intention to terminate this license, which notice shall specify the alleged neglect, failure or refusal, and if within thirty (30) days from the date of delivery of said notice the party in default shall not cure the default specified in said notice, then the other party may cancel and terminate this agreement by notifying the party in default in writing of its election so to do, without the necessity of any court action; Provided, However, that neither party shall be relieved thereby from any liability accrued at the time of such termination; and Provided Further, that if the party upon whom said notice is served shall deny that it is in default in whole or in part, as specified therein, then the party serving such notice shall not be privileged to

cancel this contract on account of the alleged default 106 specified therein, provided the party upon whom said notice shall have been served shall within said thirty (30) day period perform the agreements and submit the question to arbitration, as in this paragraph hereinafter set forth. In case of any such denial the party upon whom the notice shall have been served shall within said thirty (30) day period state in writing to the other party wherein and in what respect it denies the default specified in said notice and shall at the same time make good any default specified therein which it does not deny and appoint in writing one person as arbiter to arbitrate the question of whether or not it is in default in respect to that which it shall have denied as aforesaid, it being understood, however, that if the question shall be with respect to the amount of royalties or license fees to be paid hereunder, then the Licensee shall first pay or offer to pay the amount of such license fees or royalties which it then admits is due and payable in accordance with the terms hereof, and the acceptance thereof by the Licensor shall not operate as a waiver of any of its rights hereunder or of any claim it may have made in any notice served by it upon Licensee. The party so serving said notice shall, after the other party shall have made good any default specified in said notice which it did not deny in writing as aforesaid, including the payment of royalties or license fees, if any, admitted by it to be due and payable hereunder, and within ten (10) days from the date of the appointment of said first arbiter in accordance with the terms hereof, appoint in writing another person as arbiter, and the two persons so appointed shall within ten (10) days or as soon as possible thereafter appoint in writing a third person as arbiter. The three persons so appointed shall, within thirty (30) days from the date of the appointment of said last mentioned arbiter, or as soon as

possible thereafter, decide whether or not the party upon whom said notice has been served is in default hereunder with respect to anything contained in said notice. The decision of a majority of the three arbiters so appointed shall constitute a final settlement of the said question and be binding and conclusive upon both the Licensor and the Licensee, and if it shall have been determined by a majority of the said arbiters that the party upon whom said notice was served is in default with respect to anything contained in said notice and the party so found to have been in default shall fail or refuse to comply with the terms of the award or finding made by said arbiters within thirty (30) days from the date such award or finding shall have been made, the party serving said notice may at its election terminate and cancel this agreement in writing./In the event of default hereunder by either party and notice of such default is served by the other party as herein provided, and after service of such notice the party in default shall cure the same as hereinbefore provided the same shall constitute a nullification of said notice to the same effect as if said notice had not been served. In case at any time the Licensee shall be adjudged a bankrupt, then the license hereunder shall immediately be and become canceled and terminated, but the Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination. The waiver of any breach by either party shall not be interpreted as constituting a waiver of any further breach or breaches. Either party may proceed by action to specifically enforce this contract or any of the terms, conditions and covenants thereof by injunction or in such other manner as may be provided by law.

13. Any notice to be given under the terms hereof may be served by the Licensor or the Licensee by mailing the same to the other party hereto, postage prepaid and regis-

tered, addressed to any of its officers at its last known principal office, and the deposit of any such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder. Any telegraphic notice given under paragraph 2 hereof shall be confirmed in writing in the ordinary course of business.

14. It is understood and agreed that if at any time during the term hereof the Licensee shall, in the judgment of the Licensor, suffer substantial detriment by reason of any infringement on the part of any person or persons of any of said letters patent or of any patent that may be granted upon said applications, under which this license is granted, the Licensor will afford the Licensee such reasonable protection as in the judgment of the Licensor shall be necessary

or proper.

If a court of last resort upon final appeal or review shall decree all the claims of the patents granted for or upon said Roos and Bayer applications invalid or Licensee shall be permanently enjoined from manufacturing plasterboard and gypsum wallboard, the body or core of which is made according to the process set forth and claimed in said Roos and Bayer applications in such manner that they cannot practice in any way any of the inventions set forth in the said applications, and such injunction shall be made final by a court of last resort upon final appeal or review, then from the time the court of last resort upon final appeal or review shall decree that all the claims of the patents granted or issued for or upon said Roos and Bayer applications are invalid, or make such injunction permanent and final, the license fees or royalties to be paid by Licensee hereunder shall be reduced by one per cent (1%) of said selling price, or if a court of last resort upon final appeal or review shall

decree that all the claims of said Haggerty and Hite patents are invalid or Licensee shall be permanently enjoined from manufacturing plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said Haggerty and Hite patents in such manner that they cannot practice in any way any of the inventions set forth in said patents, and such injunction shall be made final by a court of last resort upon final

appeal or review, then from the time the court of last resort upon final appeal or review shall decree all claims of said Haggerty and Hite patents invalid or make said injunction permanent and final, the said license fees or royalties agreed to be paid by Licensee for said Haggerty

and Hite patents shall cease and determine.

15. In case Licensor shall, subsequent to the effective date hereof, grant to any other person except Abel Davis and Eugene Holland, receivers of the Universal Gypsum & Lime Co. or their successors or to the said Universal Gypsum & Lime Co., any license under said patents or applications for letters patent set forth in said Exhibit A and paragraph 4 hereof for the manufacture, sale or use of gypsum plasterboard or gypsum wallboard or bundles thereof, embodying the claims or inventions set forth and claimed in said patents or said applications, or shall grant any right under any such license, upon terms more favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license on the same terms or extend to it the same right granted to any such other person. This paragraph shall not apply to any license granted on or prior to the effective date hereof, nor shall the same apply to the terms of settlement of any claim of Licensor or provisions with respect to the payment thereof, contained in any such license.

16. The terms "gypsum plasterboard," "gypsum vallboard" and "plasterboard" shall be understood to mean all board made of gypsum, by whatever name called, having the characteristics of gypsum plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used, and shall include gypsum

laths and all other gypsum boards.

17. If at any time after the expiration of two (2) years from January 1, 1930, or such earlier date that Licensee shall make its plant ready to practice the process set forth and claimed in said Roos and Baver applications in the manufacture of gypsum wallboard or plasterboard, there shall have been invented or come into use any process which shall make the said process of forming a cellular product as set forth and claimed in said Roos and Baver applications obsolete or shall displace the same, and the Licensor shall in its own manufacture permanently and wholly abandon the use of the subject-matter of the claims of said Roos and Baver applications, it shall notify Licensee in writing thereof, and Licensee may then, upon thirty (30) days' written notice to Licensor, cancel and terminate this license in so far as the same applies to said Roos and Bayer appli-

cations or to the patent or patents granted or issued therefor or thereupon, and from the date of such cancellation the royalties or license fees to be paid by Licensee hereunder shall be reduced by one per cent (1%) of its said selling price; Provided, However, that if Licensor shall not in such event permanently and wholly abandon the use of said process but shall only partially abandon the same, then to the extent or degree and for the term that Licensor shall abandon the same in its own manufacture Licensee shall be relieved from the payment of license fees or royalties to the same extent, that is to say, if Licensor shall in such event manufacture and sell any board the core of

which is made of gypsum of a particular size, kind or make, or for a particular purpose or use, without the use of said process embodied therein, then if Licensee shall manufacture and sell the same board of the same particular size, kind or make and for the same purpose or use, without the use of said process embodied therein, then Licensee shall not be required to pay royalties or license fees upon such particular board for the term that Licensor shall manufacture and sell the same. "License fees" and "royalties" for the purpose of this paragraph shall mean one per cent (1%) of said selling price. The use by Licensor of any improvement which Licensee has the right to use as set forth in paragraph 18 hereof, or the manufacture of plasterboard or gypsum wallboard without the use of said process for sale only in foreign countries where Licensor has no patented rights in said process, shall not constitute an abandonment of said process or a partial abandonment thereof within the meaning of this paragraph.

18. If Licensor shall at any time during the existence of this agreement make or obtain any improvement for the formation of the bubble described in the process set forth in said Roos and Bayer applications and or method of its introduction in the core of plasterboard or gypsum wall-board, and which improvement is covered by the claims of said Roos and Bayer applications, and shall itself use the same in its own manufacture, then so long as Licensee shall continue to pay the license fees or royalties herein-before stipulated the right, license or privilege herein contained shall be extended to and include the use of said improvement in the manufacture by Licensee of gypsum plasterboard or gypsum wallboard, subject to all of the terms and conditions herein contained, except only that Licensee shall not be required to pay any additional sum,

royalty or license fee therefor. It is further understood that if a patent or patents shall be granted or issued for or upon said improvement, then all of the provisions of this agreement, as well as the provision of paragraph 2 hereof reserving the right in Licensor to determine and fix at any time and to change from time to time the minimum price or prices at which Licensee shall sell any gypsum plasterboard or gypsum wallboard manufactured by Licensee and embodying the claims of said patents, shall apply to the improvement set forth and claimed in any patent or patents granted or issued for or upon said improvement. Licensor will promptly notify Licensee of the general adoption by it of any such improvement in its own manufacture, together with such information as it may possess as to the use thereof in the manufacture of plasterboard and gypsum wallboard.

19. Licensee has investigated and fully satisfied itself with respect to the inventions and improvements set forth in said patents and applications for letters patent and the use thereof in its own manufacture, and has executed this agreement without relying upon any representations which may have been made by Licensor with respect thereto. No representations have been made by Licensor not expressly stated in this contract which Licensee shall at any time have any right to rely upon as an inducement for its making this contract or for any result or results to be obtained by Licensee in its own plant by its use of the inventions and improvements set forth and claimed in any of said patents

or applications for letters patent.

20. The Licensor agrees at any time during the term hereof to extent to Licensee, upon its written request, an indivisible and non-exclusive license or privilege to use the said process or processes set forth and claimed in said Roos or Bayer applications in the manufacture in its said plants of any other gypsum product not specifically covered

by this agreement and in which Licensor shall use
the same in its own manufacture and to sell the
same, upon the payment to Licensor of one per cent
(1%) of the selling price of Licensee of all of said other
gypsum product, whether or not embodying the said process
in making the same, manufactured and sold by Licensee
and upon the same terms as set forth herein and subject to
all of the conditions hereof, in which event in the agreement
for the same there shall be substituted for the words
"plasterboard and/or gypsum wallboard" the name of such
other product or products. An agreement containing all of
said terms and conditions shall be reduced to writing and

signed by both parties before the same shall become effective.

21. From the date this contract shall become effective the same shall supersede all prior license agreements at any time made between the parties hereto relating to the subject-matter hereof or relating to any of the patents or applications for letters patent referred to in this agreement; Provided, However, that Licensor shall not be barred or prevented from recovering any claim which may have accrued under any such prior license agreements prior to the time this contract shall become effective, including all payments, royalties or license fees agreed to be paid thereunder by Licensee up to the date this agreement shall go into effect.

22. This license and all of the covenants and agreements hereof shall become effective upon the date Licensor shall receive a conveyance and assignment of said-Haggerty and Hite patents to it, pursuant to authority granted by the United States District Court to the receivers of the Universal Gypsum & Lime Co., a Delaware corporation, and to said company, to sell and assign said Haggerty and Hite patents to Licensor, and from the effective date thereof this license and all of the covenants and agreements hereof

shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, but nothing in this paragraph shall be construed to permit an assignment hereof by Licensee, except as herein-

above specifically provided.

In witness whereof the parties hereto have caused these presents to be signed by their respective presidents, attested by their respective secretaries and their corporate seals to be hereunto affixed in duplicate the day and year first above written.

UNITED STATES GYPSUM COMPANY,

By S. L. AVERY, Its President.

Attest:

R. G. BAR, Secretary.

EBSARY GYPSUM Co., INC.,

By F. G. EBSARY, Its Pesident.

Attest:

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O. E. Hough, Secretary.

Exhibit "A" to agreement

Utzman patent No. 1,330,413. Application filed September 3, 1918, granted February 10, 1920, expires February 10, 1937.

Birdsey patent No. 1,358,508. Application filed January 2, 1920, granted November 9, 1920, expires November 9, 1937.

Utzman patent No. 1,383,249. Application filed August

13, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,254. Application filed July 29, 1918, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,383,255. Application filed January

2, 1920, granted June 28, 1921, expires June 28, 1938.

Birdsey patent No. 1,384,298. Application filed August 19, 1920, granted July 12, 1921, expires July 12, 1938.

Birdsey patent No. 1,395,031. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938.

Birdsey patent No. 1,395,032. Application filed January 2, 1920, granted October 25, 1921, expires October 25, 1938. Birdsey patent No. 1,406,967. Application filed January 3, 1921, granted February 21, 1922, expires February 21,

1939.

Birdsey patent No. 1,427,939. Application filed January 3, 1921, granted September 5, 1922, expires September 5, 1939.

Birdsey patent No. 1,428,624. Application filed January 2, 1920, granted September 12, 1922, expires September 12, 1939.

Brookby patent No. 1,489,693. Application filed September 25, 1922, granted April 8, 1924, expires April 8, 1941.

Birdsey patent No. 1,514,827. Application filed October 6, 1921, granted November 11, 1924, expires November 11, 1941.

Birdsey patent No. 1,515,380. Original application filed January 2, 1920, granted November 11, 1924, expires No-

vember 11, 1941.

116 Birdsey patent No. 1,518,243. Application filed September 22, 1922, granted December 9, 1924, expires December 9, 1941.

pires December 9, 1941.
Birdsey patent No. 1,525,715. Application filed January 2, 1920, granted February 10, 1925, expires February 10,

1942

Birdsey patent No. 1,526,307. Application filed October 10, 1921, granted February 10, 1925, expires February 10, 1942.

Utzman patent No. 1,540,045. Application filed March

14, 1923, granted June 2, 1925, expires June 2, 1942.

Birdsey patent No. 1,558,459. Application filed October 4, 1922, granted October 27, 1925, expires October 27, 1942.

Birdsey patent No. 1,561,635. Application filed January 3, 1921, granted November 17, 1925, expires November 17, 1942.

Armstrong patent No. 1,278,821. Application filed January 4, 1918, granted September 17, 1918, expires Septem-

ber 17, 1935.

Armstrong patent No. 1,348,387. Application filed March 15, 1919, granted August 3, 1920, expires August 3, 1937; application for reissue filed June 3, 1922, Serial No. 565,-737, reissued January 24, 1928, as Reissue patent No. 16,860.

Armstrong patent No. 1,367,292. Application filed July 12, 1919, granted February 1, 1921, expires February 1, 1938; application for reissue filed June 9, 1922, Serial No. 567,205, reissued May 22, 1928, as Reissue Patent No.

16,969.

Utzman patent No. 1,455,127. Application filed June 14, 1922, granted May 15, 1928, expires May 15, 1940.

Utzman patent No. 1,492,588. Application filed June 14,

1922, granted May 6, 1924, expires May 6, 1941.

Williams patent No. 1,519,189. Application filed August 18, 1922, granted December 16, 1924, expires December 16, 1941.

Armstrong patent No. 1,556,575. Application filed October 1, 1921, granted October 13, 1925, expires October

13, 1942.

Armstrong patent No. 1,399,455. Application filed February 24, 1920, granted December 6, 1921, expires December 6, 1938.

Tyler patent No. 1,417,117. Application filed November 15, 1919, granted May 23, 1922, expires

May 23, 1939.

Birdsey patent No. 1,643,801. Application Serial No. 437,062, filed January 13, 1921, granted September 27, 1927, expires September 27, 1944.

Birdsey patent No. 1,650,930. Application Serial No. 506,676, filed October 1, 1921, granted November 29, 1927,

expires November 29, 1944.

Birdsey patent No. 1,676,318. Application Serial No. 545,231, filed March 20, 1922, granted July 10, 1928, expires July 10, 1945.

Birdsey patent No. 1,710,915. Application Serial No. 555,627, filed April 19, 1922, granted April 30, 1929.

expires April 30, 1946.

Smith patent No. 1,603,158. Application Serial No. 662, 359, filed September 12, 1923, granted October 12, 1926, expires October 12, 1943.

Birdsey patent No. 1,666,161. Application Serial No. 737,237, filed September 12, 1924, granted April 17, 1928, expires April 17, 1945.

Utzman patent No. 1.631,108. Application Serial No. 750,224, filed November 17, 1924, granted May 31, 1927,

expires May 31, 1944.

Bookby & Absmeier patent No. 1,689,322. Application Serial No. 91,297, filed March 1, 1926, granted October 30, 1928, expires Oct. 30, 1945.

Armstrong patent No. 1,701,291. Application Serial No. 310,470, filed July 12, 1919, granted February 5, 1929, expires February 5, 1946.
Utzman patent No. 1,638,280. Application Serial No.

374,833, filed April 19, 1920, granted August 9, 1927, expires August 9, 1944.

Armstrong patent No. 1,641,611. Application Serial No. 377,421, filed April 29, 1920, granted September 6, 1927,

expires September 6, 1944.

Speer patent No. 1,686,671. Application Serial No. 427,-044, filed November 29, 1920, granted October 9, 1928, expires October 9, 1945.

Speer patent No. 1,641,648. Application Serial No. 427,-045, filed November 29, 1920, granted September 6, 1927, expires September 6, 1944.

Mehlhope patent No. 1,604,707. Application Serial No. 473,288, filed May 28, 1921, granted October 26, 1926,

expires October 26, 1943.

Gustafson patent No. 1,665,168. Application 118 Serial No. 509,366, filed December 2, 1919, renewed October 21, 1921, granted April 3, 1928, expires April 3, 1945.

Kohler et al. patent No. 1,673,944. Application Serial No. 540,412, filed March 2, 1922, granted June 19, 1928,

expires June 19, 1945.

Utzman patent No. 1,703,183. Application Serial No. 581,362, filed August 12, 1922, granted February 26, 1929, expires February 26, 1946.

Birdsey Patent No. 1,718,890. Application Serial No. 583,795, filed August 23, 1922, granted June 25, 1929, ex-

pires June 25, 1946.

Utzman application Serial No. 477,371, filed June 14. 1921, finally allowed April 26, 1929. Patent No. 1,731,116 will issue October 8, 1929.

Knode application Serial No. 590,358. Filed September

25, 1922.

Utzman application Serial No. 581,361. Filed August Sept Marie Marie 12, 1922.

Williams application Serial No. 582,606. Filed August 18, 1922.

Roos application Serial No. 733,197, filed August 20;

Bayer application Serial No. 661,723, filed September 8. 1923.

Roos application Serial No. 3477, filed January 19, 1925. Roos application Serial No. 142,155, filed October 16, 1926.

Haggerty patent No. 1,500,452. Application Serial No.

565,433, filed June 2, 1922, granted July 8, 1924. Hite patent No. 1,230,297. Application Serial No. 115,-649, filed August 18, 1916, granted June 19, 1917.

Exhibit No. 7-Price Bulletins from U.S.G. to Licensees

120 UNITED STATES GYPSUM COMPANY 300 WEST ADAMS STREET.

Chicago, February 6, 1939.

Carload Shipments-Board License Bulletin No. 1 (Page 1) — Cancels Page 1, Dated April 1, 1938

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective February 7, 1939, the minimum prices at which you may sell gypsum wall-board and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent) are as follows:

Minimum prices per thousand square feet of patented gypsum board products for delivery by rail, in straight cars or cars mixed with other gypsum products, including pool cars and stopover cars, shall be the lowest combination of mill price listed below and all rail freight from such mill to destination. Rail freight shall be determined in accordance with rail rates as published in regular freight tariffs, using weights shown below, plus all stopover, switching, cartage and other extra delivery charges in connection with the shipment. In stopover cars, minimum prices of the patented gypsum board products in any portion of the car shall be the minimum prices as herein defined to the point of delivery of that portion of the car.

. W. Gypsum Wallboard (Wt. 1050# per.M)	W. Gypsum Wallboard (Wt. 1475# per M)	% Gypsum Wallboard (Wt. 2000# per M)	%. Gypsum Sheathing (Wt. 2000# per M)	%" Tiled Gypsum Wall- bd. (Wt. 1478# per M)	"Gypsum Plaster Lath (Wt. 1475# per M	%" Gypsum Pluster Lath (Wt. 2000# per M	W. Cypsum Liner Board (Wt. 1050# per M)	%" Gypsum Liner Board (Wt. 1475# per M)	14" Gypsum Liner Board (Wt. 2000# per M)
20.00	23.00	25.00	22.00	50.00	18.00	.15.00	15.00	15.00	16.25
	. % Gyp.	. 4. Gypsum W. (Wt. 1050#1)	14" Gypsum W 14" Gypsum W 14" Gypsum W 14" Gypsum W	14. Gypsum W (W. 1050#1) 14. Gypsum W (W. 2000#1) 14. Gypsum W 14. Gypsum Sh 14. Cypsum Sh	W. 1050#1 W. 1050#1 W. Gypsum W W. 2000#1 W. Cypsum Sh W. 2000#1 W. Tiled Gypsu	W. Gypsum W. (Wt. 1050#) W. Gypsum W. (Wt. 2000#) W. Gypsum Sh. (Wt. 2000#) W. Tiled Gypsum Sh. (Wt. 2000#)	W. Gypsum W. W. 1950#7 1 (W. 1950#7 1 (W. 1950#7 1 (W. 2000#7 1 (W. 2000#7 1 (W. 2000#7 1 (W. 195 Gypsum Pl. Gypsum Pl. Lath (Wt. 142 Lath (Wt. 2000#2 Lath (Wt. 2	W. Gypsum W. (Wt. 1050#) W. Gypsum W. (Wt. 2000#) W. Gypsum Sh. (Wt. 2000#) W. Tiled Gypsum Pl. (Wt. 1020#) W. Gypsum Pl. Lath (Wt. 102 W. Gypsum Pl. Lath (Wt. 102 W. Gypsum Lit.	W. Gypsum W. W. 1950#7 W. Gypsum W. W. 2000#7 W. 2000#7 W. 2000#7 W. 2000#7 W. Tiled Gypsum Pl. Lath (Wt. 162 Gypsum Pl. Lath (Wt. 165 #7 W. 1650#7 W.

#### Cancels Page 2-Bulletin No. 1-121 Dated March 25, 1938

Where an old 'rate per ton' is in effect (example: \$3.45) per ton) the freight per M sq. ft. shall be figured on the basis of rate per cwt., fractions of less than 1/4¢ per cwt. to be dropped, fractions of  $\frac{1}{4}e$  per cwt. to  $\frac{1}{2}e$  per cwt. to be considered as  $\frac{1}{2}e$ . Example: The rate of \$3.45 per ton equals 171/4¢ per cwt. For purpose of arriving at delivered price, however, the rate of 171/2¢ shall be used.

The above prices apply to the sale of all patented gypsum board embodying the claims of our patents in all markets except where an exception is made as hereinafter expressly

stated:

(1) Pacific Coast—Until further notice, minimum prices as above defined shall not apply to sales of the patented gypsum board products for shipment to or delivery in the following area: States of California, Arizona, Nevada, Utah, Idaho, Oregon and Washington; also that portion of the State of Montana west of and including Phillips, Petroleum, Musselshell, Yellowstone and Carbon Counties.

(2) 32"x48" Gypsum Board—Specific Roof Jobs—The minimum price of cutstock board in size 32"x48", when sold for use on specific roof jobs, is the same as the minimum

liner board price.

(3) Key West, Florida—The minimum price of patented gypsum wallboard delivered to Key West, Florida is \$24.00 per M sq. ft.

The minimum price of 3/8" patented gypsum wallboard delivered to Key West, Florida is \$29.00 per M sq. ft.

† The minimum price of 3/8" patented gypsum plaster lath delivered to Key West, Florida is \$17.20 per M sq. ft.

(4) Minimum Prices into Delivered Price Areas-Minimum prices of the patented gypsum board products in straight cars or cars mixed with other gypsum products, including pool cars and stopover cars, for delivery by rail within areas listed below, are the prices set forth below plus any stopover charges (except that stopover charges need not be added to determine the minimum price on shipments to destinations in delivered price areas wherein the minimum price delivered by truck is the same as the minimum price for delivery by rail):

		-								
	Wallboard	% Gypsum Wallboard	14" Gypsum Wallboard	14" Gypsum Sheathing	%" Tiled Cypsum Wallbd	%" Gypsum Flaster Lath	14" Gypsum Flaster Lath.	. 14" Gypsum Liner Board	%" Gypsum Liner Board	14" Gypsum Liner Board
(a) Into Essex, Middleaex, north of continuation Manhattan, Bronx, Kin Bergen, Passaic, Union New Jersey; also that west corner of Monmo gomery, Chester, Delay	of South ness, Queen, Morris portion outh Cour ware and	nern bo ens, Ric i, Some of Buri nty to Philade	undary chmond, rset, Mi lington	of Norf and Na ddlesex County, heast c ounties,	olk Coussau Co Monm N. J., orner of Penna	nty, and unties, I outh. A west of f Camdo	l town of New York Inches to Court	f Mansfrk; also and Ca ending ity; also	Hudson Mudson mden C from the Bucks	ss., also Essex, counties, e south, Mont-
122	Cancel	s Pa Date	ge 3- ed Ma	–Bul ay 27	letin , 193	No. 1	I—			
(b) Into balance of Plymocester and Barnstable also State of Rhode Is New York: also Susse Gloucester Counties, N tending from the sout also New Castle Cour Penna:	Counties, land; als x, Warre lew Jerse hwest co	Mass. o Fairf n. Hun ey: alse rner of	; also R leid Cou terdon, that p Monmo	lockingh inty, Co Ocean, ortion out outh Cou	am and nnectice Atlantic of Burli	Straffo it; also c. Cape ington ( he north	Orange May, County, least con	and Pu umberla N. J.,	ew Han stnam C and, Sal east of camden	npahire; counties, lem and line ex- County;
0 7	21.05	24.50	27.00	24.00	51.50	14.50	17.00	16.05	16.50	18.25
(c) Into Westchester, Roc	kland an		lk Coun 26.75				16.75	15.90	16.30	• 18.00
(d) Into State of Connection		,	field and				17.25	16.20	16.65	18.50
(e) Into Sullivan, Ulster			27.50						16.85	
(f) Into Delaware, Greene	*		Counties 28.00			1 15.20	18.00	16.60	17.20	19.25
(g) Into Niagara and Eric	· · · · · · · · · · · · · · · · · · ·		York (					15.75	16.05	17.65
(h) Into Cook and DuPag Park, Blodgett, Briarg	ate and I	ake Fo	rest, in	Lake Co	bunty, I	llinois:			-	
	20.40	23.55	25.75	12.76	50.55	13.55	15.45	15.40	15.55	17.00
(i) Into McHenry, Kane gett, Briargate and L	and Lake	Count	ies, Illir	ois (ex	cept tov	ens of I	eerfield	. Highle	and Par	k, Blod
	20.55	23.75	26.00	23.00	\$0.75	18.75	16,00	15.55	15.75	17.25
(j) Into Wayne County, I and Royal Oak in Oak Saint Clair Shores, Es	land Cou	nty. Ma	chigan:	and to	wns of	Warret	. Half	way. Fr	aser. R	tel Park oseville,
			26.50				/		16 10	17.75

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(k) Into Grand	Rapids, Mich.,	Switching	Area is	s descri	bed in	publishe	d railros	d tariffe	1:	
	2	1.00 -24.00	26.00	23.00	51.00	14.00	16.00	16.00	16.00	17.25
(l) Into Jackson	ville and So. J	acksonville,	Fla., S	witching	Area,	where	per car	witchir	g rates	appl
(an described			acces .							

# (5) Minimum prices delivered in Markets as listed are same as in adjacent cities, as indicated below:

	Same as
College Park, Ga. Elkridge, Glen Burnie, Catonsville, Riderwood and	Atlanta, Ga.
Bristol, Tenn. Cheviot, Bridgetown, Mount Healthy and North College	Baltimore, Md. Bristol, Vs.
Hill, Ohio Euclid, North Randall and Bedford, Ohio Dodson, Edgecomb, Waldo and Westport, Mo.; Rosedale, Argentine, Overland Park, Merriam and Kansas City,	Cincinnati, O. Cleveland, O.
Kansas Saint Louis County and town of Imperial (in Jefferson County), Missouri	Kansas City, Mo.
Armory, Indian Orchard, Oak Street and Chicopee, Mass. South Windham, Maine	St. Louis, Mo. Springfield, Mass. Portland, Maine
Gabe, Shepard and Wilmont, Okla. Rossiyn and Lacy: Virginia, and Montgomery County, Md. Omaha, Nebraska	Oklahoma City, Okla. Washington, D. C. Council Bluffs, Ia.
Moline, East Moline and Rock Island, Illinois Virginia Beach, Virginia Boardman, Ohio	Dåvenport, Iowa Norfolk, Va. Youngstown, Ohio

(6) Minimum Prices to Contractors—Consumers—On sales of standard sixes to contractors, roofing contractors, metal ceiling contractors, prefabricated house manufacturers and consumers generally, the minimum price shall be the minimum price as above established plus the following

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amounts per M sq. ft.:

d [Std. Si	zés					
To Contractors (Inc. Meta) Ceiling Contra.) & to Pre- fabricated House Mfrs. and Consumers Generally		To Contractors for Use on Roof Decha				
Lath & Liner	Wall Bd. 4	Lath &				
1.25	. 1.25	1.23				
	tra.) & to Pre- House Mirs. and rs Generally  Lath & Liner	trin.) & to Pre- House Mfrs. and To Con for Use on  Lath & Wall Bd. & Sheatbing				

(7) Minimum Prices for Non-Standard or Odd Sizes— On sales of non-standard or odd sizes, the minimum price shall be the minimum price as above established plus the following amounts per M sq. ft.:

		· [Odd Size	e!		No. of the last	
To D	ealers	To Contract Ceiling Contro fabricated Hou Consumers	se Mfrs. and	To Contractors for Use on Roof Decks		
Wall Bd. & Sheathing	Lath & Liner	Wall Bd. & Sheathing	Lath &	Wall Bd. & Sheathing	Lath &	
2.50	1.25	5.00	2.50	1,25	1.25	

Yours very truly,

UNITED STATES GYPSUM COMPANY,

Vice President.

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UNITED STATES GYPSUM COMPANY,
300 WEST ADAMS STREET,

Chicago, March 25, 1937.

Supplement to Board License Bulletins Nos. 1 & 2— Dated February 24, 1937.

DEAR SIRS: Referring to our license contract with you, you are hereby notified that effective immediately, the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent); including Haggerty patent number 1,500,452 and Hite patent number 1,230,297, are supplemented as follows:

24"x48" Cutstock Liner Board—in order to afford opportunity to move excessive stocks accumulated in southwest which are subject to imminent deterioration, the price of this product for shipment and delivery in state of Oklahoma only, until further announcement, shall be same as minimum

gypsum plaster lath price.

Yours very truly,

UNITED STATES GYPSUM COMPANY,

Vice President,

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## UNITED STATES GYPSUM COMPANY, 300 WEST ADAMS STREET.

Chicago, April 1, 1938.

Prices F.O.B. Trucks at Mills & Warehouses Board License Bulletin No. 2 (Page 1) Cancels Page 1 Dated March 15, 1938.

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective April 5, 1938, the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Haggerty patent number 1,500,452 are as follows:

Dealer Prices F.O.B Trucks, Mills or Whses. (Applying for Standard Sizes as Listed in Bulletin No. 4)	14" Gypsum Wallboard. (Wt. 1050# per M)	%".Gypsum.Wallboard (Wt. 1475# per M)	1/2" Gypsum Wallboard (Wt. 2000# per M)	14" Gypsum Sheating (Wt. 2000# per M)	%" Gypsum Wallboard (Wt. 3300# per M)	%" Tiled Grosum Wallbd. (Wt. 1475# per M)	%" Gypsum Plaster Lath (Wt. 1475# per M)	14. Gypsum Plaster Lath (Wt. 2000# per M)	14" Gypsum Liner Board (Wt. 1050# per M)	%" Gypsum Liner Board (Wt. 1475# per M)	15" Gypsum Liner Board (Wt. 2000# per M)
Boston, Mass.	21.00	24.00	26.00	23.00	1	51.00	14.00	16.00	16.00	16.00	17.25
Cleveland	20.80	24.10	26.50	23.50		51.10	14.10	- 16.50	15.80	16.10	1-17.75
Eldorado, Okla.	1	****	1000				16.00		I	I/wil	
	21.00	24.00	26.00	23.00		61.00	14.00		J 16.00	16.00	17.25
Fort Dodge, Iowa	21.00	24.00	26.0Q	23.00	87.50	51.00	14.00	16.00	16.00	16:00	17.25
Grand Rapids, Mich.	21.00	24.00	26.00	23.00	. 64.	51.00	14.00	16.00	1 16.00	16.00	17:25
Gypsum, Ohio	21.00	24:00	26.00	23.00	-37.50	81.00	14.00	16.00	16.00	16.00	17.25
Heath. Montana	20.00	28.00	25.00	22.00		50.00	13.00	15.00	1 15.00	15.00	16.25
Kansas City, Mo.†			,	1		56.78+					
Laramie, Wyo.†	24.55†	29.85†				56.351	19.35+	****	ele.	01 07A	
Loveland, Colo.†	24.55†	29.35†		30.601		56.35†	19.85+	****		21.85†	
MetroNY-NJWhses.*	20.80	24.10	26.50	23.50		51.10	14.10	16.50	15.80	21.35†	/
Miami, Fla.						1	17.50		19.80	18.10	17.75
Milwaukee, Wis.				/			15.67				
National City, Mich.	21.00	24.00	26.00	23.00		51.00	14.00 .	16.00	10.00		11/1
Dakfield, N. Y. *	20.75	24.05	26.40	23.40	38.80	51.05	14.05		16.00	16.00	17.25
Philagelphia, Pa.	20.80	24.10	26.50	23.50		81.10		16.40	15.75	16,05	17,65
Piedmont, S. D.†	24.10†	28.75†	32.801	-	****		14.10	16.50	15.80	16.10	17.75
Plásterco, Va.	21.00	24.00	26.00	23.00	****	51.00	18.75†	10.00		· · · · /	
Portsmouth, N. H. *	21.47	25.07	27.80	24.80	****	52.07	14.00	16.00	16.00	16.00	17.25
Southard, Okla.	21.00	24.00	26.00	23.00	37.50	51.00	15.07	17.80	16.47	17.07	19.05
Sweetwater, Tozas	21.00	24.00	26.00	28.00	01.00	51.00	14.00	16.00	16.00	16.00	17.25

<sup>\*</sup> Minimum pickup 7500 sq. ft. patented gypsum board products. Note: Any mixture of regular patented board products (including special surfaced gypsum board products) and metallized patented

Cancels Page 2 Dated March 15, 1938

board products may be combined to make up the 7500 feet minimum. Exception: %" Tiled Gypsum Wallboard or special surfaced gypsum board products may be picked up in any quantity at Metro, N.Y.-N.J. Warehouses, Boston, Mass., Portsmouth, New Hampshire and Philadelphia, Pa.

<sup>†</sup> Indicates changes in this reissue.

The above prices apply to the sale of all board embodying the claims of our patents in all markets except where an

exception is made as follows:

(1) 32"x48" Gypsum Board—if grey surfaced and round edged, is subject to the minimum liner board price, to any destination. Square edge or cutstock gypsum board in size 32"x48" is subject to the minimum wallboard price, except where used for specific roof jobs only, size 32"x48" cutstock board is subject to the minimum liner board price for such specific jobs.

(2) 36"x48" Gypsum Board—36"x48" is standard liner board size in all states for use on specific gypsum roof jobs only, and is subject to minimum liner board price for such

specific gypsum roof jobs.

(3) Sales to contractors and prefabricated house manu-

facturers, also extras on odd sizes:

(a) On sales of standard sizes to contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof jobs only):

A	[Std. Siz	es]	1111111	
To Contractor Ceiling Contra fabricated	s (Incl. Metal s.) & To Pre- House Mfrs.	To Roofing Contractors		
Wall Bd. & Sheathing	Lath &	Wall Bd. & Sheathing	Lath &	
2.50	1.25	1.25	1.25	

(b) On sales of odd sizes to dealers, contractors, roofing contractors, metal ceiling contractors and prefabricated house manufacturers, add differentials per M sq. ft. as follows: (Note: Sales to roofing contractors are for specific roof job only):

		[Odd Siz	es.)	1 1		
To Dealers		To Contractors Ceiling Contra fabricated E	.) To Pre-	To Roofing Contractors		
Wallbd. & Sheathing	Lath &	Wallbd. & Sheathing	Lather Liner	Wallbd. & Sheathing	Lath & Liner	
2.50	1.25	5.00	2.50	1.25	1.25	

Yours very truly,

UNITED STATES GYPSUM COMPANY,

Vice President.

#### UNITED STATES GYPSUM COMPANY 300 WEST ADAMS STREET,

Chicago, July 16, 1938.

Board Prices, Delivered by Truck to Dealers' Warehouses— Board License Bulletin No. 3 (Page 1)—Cancels Page 1, Dated October 21, 1937

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective immediately the minimum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), including Hag-

gerty patent number 1,500,452, are as follows:

(1) Eastern Area: Minimum prices for patented gypsum board products delivered by truck to dealers warehouse are same as prices for deliveries in carloads by rail, as provided in Board License Bulletin No. 1. This applies into States of New Jersey, Connecticut and Rhode Island; Essex, Middlesex, Suffolk, Norfolk, Worcester, Plymouth, Bristol and Barnstable Counties, Massachusetts; York and Cumberland Counties, Maine; Rockingham, Strafford, Belknap, Merrimac, Sullivan, Cheshire and Hillsborough Counties, New Hampshire; Manhattan, Bronx, Kings, Queens, Richmond, Nassau, Suffolk, Westchester, Rockland, Orange, Putnam, Sullivan, Ulster and Dutchess Counties, New York; Bucks, Montgomery, Chester, Delaware, Philadelphia, Lehigh and Northampton Counties, Pennsylvania; New Castle County, Delaware. See paragraph 3 for minimum loads.

(2) Western New York Area: Minimum prices for patented gypsum board products delivered by truck to dealers warehouse are same as prices for deliveries in carloads by rail, as provided in Board License Bulletin No. 1. This applies into Erie, Niagara, Orleans, Genesee, Monroe, Ontario, Wayne, Seneca, Wyoming, Cattaraugus, Chautauqua, Allegany, Steuben, Yates and Livingston counties, New York; also Crawford, Erie, McKean and Warren counties, Pennsylvania. See paragraph 3 for minimum

loads.

(3) Minimum quantities: (Applying to paragraphs 1 and 2 above). Each truck delivery of patented gypsum board products at carload prices shall contain a minimum of 7500 sq. ft. gypsum board products consigned to one destination and invoiced to one account. Truck deliveries

shall be made by manufacturer's own trucks or those hired by manufacturer from regular trucking companies. Note: Any mixture of metallized and regular patented board products (including special surfaced gypsum board products) may be combined to make up the required minimum load.

(4) Detroit Area: \*Minimum prices for patented gypsum board products delivered by truck to deal-129 er's warehouse are same as prices for deliveries in carloads by rail, as provided in Board License Bulletin No. 1. Truck delivery shall be in minimum straight loads of 5,000 sq. ft. gypsum board products, or n mixed loads minmum weight 10 tons with other products, consigned to one destination and invoiced to one account. Only those materials taking regular straight or mixed carload plaster and board rates may be included with patented gypsum board products to make minimum weight. This applies to Wayne County, Michigan; towns of Birmingham; Clawson, Farmington, Ferndale, Hazel Park and Royal Oak in Oakland County, Michigan; also towns of Warren, Halfway, Fraser, Roseville, Saint Clair Shores, East Detroit, Van Dyke and Centerline in Macomb County, Michigan.

(5) Miami Area: Minimum prices for patented gypsum plaster lath as provided in Board License Bulletin No. 1 for shipment into Palm Beach, Dade, Broward and Monroe Counties, Florida, shall also apply to minimum carload quantities (20 tons) deivered by truck to dealers warehouse, providing such carload quantity is consigned to one destination and invoiced to one account, and providing delivery of entire carload quantity is made at one time. Patented gypsum plaster lath may be combined with other

gypsum products to make minimum weight.

Yours very truly,

UNITED STATES GYPSUM COMPANY,

Vice President.

· Indicates change in this reissue.c

UNITED STATES GYPSUM COMPANY

300 WEST ADAMS STREET,

Chicago, February 6, 1939.

Application of Prices—Board License Bulletin No. 4 (Page 1)—Cancels Bulletin No. 4, Dated June 12, 1937

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective immediately the minimum prices at which you may sell gypsum wallboard and

gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including

applications for letters patent), are as follows:

The minimum prices named in Bulletins 1, 2 and 3 apply (except where otherwise specified) to sales of patented gypsum board products in sizes suitable for use in construction and regularly manufactured and offered for sale for use in construction, which products are sometimes referred to herein as standard size products. Such sizes are now as follows:

. 16	Thickness & Width Length	
(1)	Square Edge Wallboard:	
	4" x 32" or 48"	
P.	1/2" x 32" or 48"	
(2)	T&G Edge Wallboard:	
	1/2" x 36" or 48"8'-9' and 10'	
(3)	T&G Edge Sheathing:	
	1/4" x 24"6'-8" and 8'	
(4)	Plaster Lath:	
- 1	%" x 16" 32"-36" and 48"	
	3/2" x 16"	- '
(5)	Liner Board:	
	1/4" x 24",	
	14" x 32"	
	14" x 32"	,
	%" x 32"	
.*	20" = 20" . AS" (gray surfaced and round adread	)
	14" x 24"	
	1/3" X 32"	
	1/2" x 32"	,
(0)	Special Liner Board for Use on Specific Roof Jobs:	
	%" x 32" or 36"48" 1/4" x 32" or 36"48"	
	Very truly yours,	
:	UNITED STATES GYPSUM COMPANY,	

Vice President.

131 UNITED STATES GYPSUM COMPANY

300 WEST ADAMS STREET,

Chicago, February 6, 1939.

Effective Date of Minimum Prices—Rebates—Board License Bulletin No. 5 (Page 1)—Cancels Bulletin No. 5, Dated February 24, 1937

DEAR SIR: Referring to our license contract with you, you are hereby notified that effective immediately the mini-

mum prices at which you may sell gypsum wallboard and gypsum plasterboard manufactured by you and embodying the inventions and improvements set forth and claimed in our patents under which you are licensed (not including applications for letters patent), are as follows:

#### Advances in Minimum Price

In the event of an increase in the minimum prices of patented gypsum board products, the advanced minimum prices shall apply to all shipments made after the effective date of the price increase, except that in the following cases the minimum price shall be the minimum price in effect immediately prior to such increase:

(1) On bona fide orders for dealers' stocks actually received and accepted at your home office in writing before effective date of the price increase and shipped by you within 10 days after effective date of price increase.

(2) On sales of gypsum plaster lath to dealers for any specific job requiring not less than the minimum carload quantity of plaster lath (each building of a project to be considered as a separate specific job hereunder); and

On sales of gypsum wallboard or gypsum liner to gypsum roofing contractors for specific gypsum roof jobs; and

On sales of gypsum wallboard, gypsum sheathing or gypsum liner board to dealers for specific industrial housing projects; and

On sales of gypsum wallboard, gypsum sheathing or gypsum liner on direct bids to the federal government for

specific federal government jobs;

But only where the general contract for such specific job is awarded prior to the effective date of the price increase, or where the dealer (or contractor on specific roof jobs) has made a written quotation on such job prior to

the effective date of the price increase, and providing the order is placed by such dealer or contractor and accepted by the licensee within 30 days, on private jobs, and 60 days on federal government jobs, after

the effective date of the price increase.

(3) On orders received from the General Supply Committee of the Executive Departments and Independent Establishments of the United States Government under contract awarded by that committee, prior to the effective date of price increase.

<sup>\*</sup> A Federal Government job is one where the Federal Government lets the contract to a general contractor or places an order directly with licensee.

#### · Decreases in Minimum Price

In the event of a decrease in the minimum prices of the patented gypsum board products, the new and lower minimum prices shall apply to all sales and shipments made after the effective date of the decrease in minimum price, including all orders for the patented gypsum board products on file at the time of decrease in minimum prices, and also shipments in transit; but licensee must be prepared to furnish licensor with satisfactory evidence of the fact that the shipment was actually in transit and not delivered when the price decrease became effective. Carrier's freight bill will be accepted as evidence of that fact.

### Rebates, Allowances, Etc.

Any sale of patented products, though ostensibly made at or above the minimum price established by licensor, will nevertheless be considered a violation of the provisions of the license if licensee directly or indirectly reduces the actual price charged by licensee below such minimum price by granting the customer rebates, unearned or unwarranted refunds, credits or discounts, by reducing the price of other products, by hiring customers' trucks, by granting allowances for advertising or other purposes, by splitting of salesmen's compensation or commissions with customers, by overshipment of patented products, by including board under the guise of dunnage, or by making any other payment or allowance in the form of money or otherwise which has for its purpose and effect reducing the price charged by licensee below such minimum price.

Very truly yours,

UNITED STATES GYPSUM COMPANY,

Vice President.

133 Exhibit No. 8—The First Roos Foam Patent

Patented Oct. 8, 1935 2,017,022
United States Patent Office
2,017,022. CEMENTITIOUS MATERIAL

CARLISLE K. ROOS, FORT DODGE, IOWA, ASSIGNOR TO UNITED STATES GYPSUM COMPANY, CHICAGO, ILL.,
A CORPORATION OF ILLINOIS

No Drawing. Application August 20, 1924, Serial No. 733,197. 12 Claims. (Cl. 106-24).

This invention relates to building materials and more particularly to a light weight cementitious material of this

character and the method for producing the same.

It is an object of this invention to combine with the cementitious material used for the finishing of walls, in the production of plaster wallboard, partition tile, roof tile, poured roof and floor constructions and other structural building units certain materials that will reduce the weight of such articles, will not shrink or fall when cast, and which will not materially reduce the hardness or strength of the material now employed for such purposes by expanding the cementitious material into cellular form while in the moist or wet state, thereby increasing its volume, and maintaining the same until hardened or set.

Ordinary hydrated gypsum plaster weighs from about 65 to 85 pounds per cubic foot. By the process developed here weights may be obtained in cast articles ranging from those mentioned above down to about 15 pounds per cubic This is brought about by incorporating an aerated foam into the cementitious material, thereby imparting a cellular structure to the mass which forms a product of light weight. Such a foam may be obtained by the violent. agitation of solutions of certain compounds which act as foaming reagents. This foam may be whipped into a fine grained form and to further stabilize it, it has been found desirable to stir into it a certain quantity of calcined gyp-This addition was found to reinforce the walls of the bubbles to such an extent that the foam might be preserved indefinitely. Other addition reagents such as gelatin, dextrin and gum arabic have a similar foam preservative effect. This reinforced foam may be stirred into any mass of wet plaster or other cementitious material without destroying the character of the foam and thus a cellular structure is imparted to the wet mass.

The first step in carrying out this invention is the preparation of a solution capable of being converted into a foam by agitation. There are several types of reagents which will produce such a foaming solution or mixture such as solutions, mixtures or emulsions of flotation oils, various organic compounds similar to soap, saponin, soap bark, gelatin, licorice, etc. The efficiency of the above mentioned reagents of course varies considerably and it has been found that a water solution containing up to three percent of powdered soap bark produces satisfactory results, however, it is not desired to limit the means of production or the reagents used in the production of this foam, as it may

be desired to assist the formation of this foam by means of an addition of such reagents as calcium carbonate and aluminum sulphate to the foaming solution, which in their chemical reaction evolve a gas. Such a solution as of soap bark and water may be agitated or whipped into a foam in the same manner as eggs or cream. Immediately after the formation of satisfactory foam a relatively small quantity of calcined gypsum is added and stirred into it thoroughly. This reinforced foam is in a condition to be more readily assimilated by the main untreated cementitious mass to which it is subsequently added with sufficient agitation to obtain uniform distribution. The quantity of foam incorporated into the wet mass will of course determine its cellular structure, and this in turn determines the bulk and weight when dry.

A specific example of the process with approximate quantities of the materials used is as follows: One part of powdered soap bark is added to 160 parts of water and allowed to soak for a few minutes. This solution is vigorously agitated until the liquid is entirely beaten into a stiff foam. Two hundred parts of calcined gypsum are now added to the foam and stirred into it until its distribution is complete. This foam, when stirred into a mass of twelve hundred parts of calcined gypsum and the required amount of water to bring it to normal consistency, will effect a reduction in weight of the subsequently set or hardened

mass of about 30%.

This process possesses the following advantages. The weight control is effected by the amount of foam which in turn is determined by the weight of soap bark. Installation, operation and reagent costs are small. Drying costs of the finished product are not increased. In this process the increase in water contents is very slight, and the porous nature of the product permits drying at a lower temperature and in a shorter time. The foam does not hinder or retard the setting of the calcined gypsum to any noticeable extent. An examination of the hardened mass shows a very uniformly fine cellular structure. The strength of the material is less than the normal value but is not reduced in proportion to its weight and still has hardness enough for many structural purposes. The plastic mixture produced by this process may be moulded and worked and cast in the same manner as the usual practice.

While ordinary hydrated gypsum has been used as a specific example of cementitious material in carrying out this invention, it is to be understood that other cementitious materials, such as, Portland

cement, natural cements, oxichloride cements, and in fact any cementitious material capable of being molded or cast while in the plastic state, may be used as well and the resultant porous structure is just as pronounced irrespective of the nature of the cementitious material and its time of set. This is possible because the foaming agent can be so manipulated that foams of adequate permanence for greatly lengthened time of set in the cast articles can be provided.

What I claim is:

1. The process of producing a light weight building material which comprises incorporating in a mixture of calcined gypsum and water a stabilized foam and allowing the mixture to set.

2. The process of producing a light weight building material by incorporating in a mixture of cementitious material binding fiber and water, a preformed tenacious feam that imparts a cellular structure thereto to increase the volume of said mixture, and then removing the excess moisture, said feam maintaining the cellular structure in said mixture when hardened and dried.

3. The process of producing a light weight building material by forming a foam through beating air into a solution containing a foaming agent and incorporating the foam into a mixture of calcined gypsum and water

by agitation and allowing the mass to set.

4. The process of forming a cellular cement which comprises forming a tenacious foam and mixing the foam with a cement.

5. The method of making a light weight building material that possesses a cellular structure which comprises making a tenacious foam and mixing the same with a substance capable of being hardened.

6. A plastic mass capable of being hardened into a light weight cellular building material comprising a mechanical mixture of a stable foam, a material capable of being hard-

ened, and water.

7. A plastic mass capable of being hardened into a light weight cellular building material comprising a mechanical mixture of a stable foam, a cementitious setting material, and water.

8. A plastic mass capable of being hardened into a light weight cellular building material comprising a mechanical mixture of a stable foam, calcined gypsum, and water.

9. A light weight building material composed of a hard mass of cellular structure which comprises set cementitious

material having permanently fixed therein foam cells that possess their original form and which are arranged

throughout the structure in foam-like formation.

10. A structural building material comprising a mass of set cementitious material having foam-like arranged voids therein left by the drying of the bubbles of a stable foam which had been added to the cementitious material while the latter was in a plastic state.

11. A light weight cellular building material resulting from the setting and drying of a water-gauged composition comprising calcined gypsum and an aggregate com-

posed of a stable foam.

12. A light weight cellular building material resulting from the hardening and drying of a plastic composition comprising a substance capable of hardening when dried and an aggregate composed of a stable foam.

CARLISLE K. ROOS.

136 Exhibit No. 9-The Second Roos Foam Patent

Patented May 4, 1937 2,079,338
United States Patent Office
2.079,338. CEMENTITIOUS MATERIAL

CARLISLE K. ROOS, FORT DODGE, IOWA, ASSIGNOR TO UNITED STATES GYPSUM COMPANY, CHICAGO, ILL., A CORPORATION OF ILLINOIS

No Drawing. Application January 19, 1925, Serial No. 3,477. 5 Claims. (Cl. 106—24).

This invention relates to improvements in building material and more particularly to the production of cementitious material of a porous structure which is obtained by the use of confined gas as an aggregate, rather than gas as an expansive force to distend the volume of the

cementitious material during the setting process.

Cementitious material and particularly calcined gypsum has been employed for years as a finishing coat or covering for the interior walls of buildings, and has been molded into blocks to form partitions and tiles to form roofs and floors, it has also been employed as a filler in poured roofs and floors and as a core for plaster board and plaster wall-board, as well as having been employed in other forms and articles. Calcined gypsum on account of its non-conductive and fire resisting qualities has been a desirable product for the purposes above described. In wall coverings the calcined gypsum has been used with sand as an aggregate to give it body for the first coats and a retarder to delay

the setting so that it may be properly applied and in other cases fiber and sawdust has been added as an aggregate in lieu of the heavy sand aggregate which reduces the weight of the finished product. In the formation of roofs, floors, tile, block and plaster board or wallboard the addition of fiber or sawdust aggregate detracts from its fire resisting quality which is as desirable in these products as decreas-

ing the weight of the finished product.

To overcome this objection and produce such articles of calcined gypsum in which the weight is greatly reduced and in which the articles possess the qualities of unadulterated set gypsum, certain chemicals or minerals have been added to the dry calcined gypsum which will upon the addition of water evolve a gas causing the mixture to puff out or expand in volume and upon the setting of the gypsum will form a porous body so that articles thus produced will be of less weight per volume and be as fire resisting and better insulating mediums than unadulterated

set gypsum.

It is an object of this invention to produce a porous body of set calcined gypsum without the use or addition of chemicals or gas producing agents to the gypsum which react with the water to form an expanded plastic mass to be molded or otherwise formed into the required shape of the article desired. To this end an inert foam is formed comprising a plurality of minute bubbles or air the enveloping films of which are so individual in mass form that these air bubbles are in effect an aggregate and then as the calcined gypsum is being mixed with water, in the same manner as ordinarily employed to form the desired article, such inert aggregate of minute air bubbles is thoroughly incorporated in the plastic mass during the mixing process.

The incorporation of the air or gas aggregate has the same effect upon reducing the density of the plastic mass as any other aggregate lighter in weight than the cementitious material itself and reduces density of the entire mass to give lighter weight per unit volume. Because the air or gas is so much lighter in weight than any solid aggregate the reduction in unit volume weights is correspondingly much greater and due to the fact that the air or gas is so thoroughly confined in such a tough film or film forming substance, the air or gas will remain confined during the mixing process of cementitious solid and water and thus permit of the novel aggregate being incorporated therein. Any amount of porosity desired can be produced

and a definite size of porosity can be maintained, because the tough filmed bubbles of air or gas maintain their identity until the gypsum has set, and the tough film envelope of the confined air or gas aggregate is replaced by a permanent set wall of cementitious material with the air or

gas still confined.

This application is a continuation-in-part of my prior application Ser. No. 733,197, filed August 20, 1924, now U. S. Patent No. 2,017,022, which describes broadly the application of this principle of reducing the weight of articles made from calcined gypsum by the incorporation of a foam of minute air bubbles in the plastic mass and specifically describes the reinforcing of the air bubble enveloping films by an inorganic stabilizer, such as calcined gypsum, before the foam is mixed with the plastic This prior application describes the foam being whipped into a fine grained form and stabilized by the addition of a relatively small quantity of calcined gypsum which reinforces the walls of the bubbles to such an extent that the foam might be preserved indefinitely. It also states that other reagents such as gelatin, dextrin and gum arabic added to the foam will reinforce the walls of the bubbles and produce a preservative effect.

In the formation of articles produced in accordance with this invention which are dried or set in the open air a foam of air bubbles stabilized by an inorganic agent, such as calcined gypsum, is desirable, while in the formation of plaster board and other articles subjected to the heat of a drying kiln to set a foam with air bubbles stabilized by

organic agents is desirable. In molded articles, where
no external pressure is applied, the air bubble walls
may be readily reinforced, as specifically described in
my said prior application, by calcined gypsum or other inorganic agent which will harden and produce a rigid and
more or less fragile wall, and foam bubbles so stabilized
will act satisfactorily in such articles but where external
pressure is applied to air bubble foam and cementitious
material mixture the best result is obtained by a foam in
which the walls of the air bubbles are tough and pliable.

In applying this invention to the manufacture of plaster wallboard such as made on a continuous machine like that described in the Utzman Patent 1,330,413, February 10, 1920, and afterwards dried in a drying kiln the foam is produced and then deposited upon the mixing belt where the calcined gypsum and water are mixed by the mixing fingers to form a homogeneous mass to be deposited upon

the bottom cover sheet of the wallboard as it advances thereunder. It is seen that the addition of an inert foam at this step in the process of making wallboard is treating the foam in the same manner as any other aggregate that may be desired to be incorporated in the body of the core of the wallboard. In the course of formation of plaster wallboard on machines similar to the above referred to Utzman patent the plastic mass deposited on the bottom cover sheet is advanced between pressure rolls as the top cover sheet is applied, the pressure so applied to the plastic mass collecting in front of the rolls spreads it out to form a core between the top and bottom cover sheets of even thickness between the edges.

In such an application of this invention the first step is to prepare a solution capable of being converted into a foam by agitation. There are several types of reagents which will produce such a foaming solution or mixture such as solutions, mixtures, or emulsions of flotation oils, various organic compounds similar to soap, saponin, soap bark, albumens, licorice, etc. The efficiency of the above mentioned reagents of course varies considerably and it has been found that a water solution containing up to three percent of powdered soap bark produces satisfactory results. Such a solution of soap bark and water may be agitated or whipped into a foam in the same manner as

eggs or cream.

Immediately after the formation of satisfactory foam a relatively small quantity of gelatin, dextrin, gum arabic or other organic colloid such as rice flour or other farinaceous paste is added and stirred into it thoroughly. The addition of this colloidal agent will reinforce the film enveloping the air bubbles so that each one will have tough and pliable walls and enable the bubbles to form an aggregate that may be substituted for solid aggregate. stabilized foam is then deposited on the mixing belt of the machine and stirred into the mixture of water and calcined gypsum thereon by the mixing fingers until the whole is a homogeneous mass as it is deposited on the advancing covering sheet. The walls of the air bubbles incorporated in the plastic mass being tough and pliable not only remain intact during the mixing with the cementitious material and water but are not broken or changed in volume and the aggregate formation is maintained in passing through the pressure rolls as the board is formed. The quantity of foam incorporated into the wet mass on the mixing belt will of course determine its cellular structure, and this in turn determines the bulk and weight of the finished product. The wallboards so formed are quickly dried by passing through a drying kiln as they are

removed from the discharge end of the machine.

In such an application of this invention the foam is continuously mixed, stabilized and immediately incorporated into the plastic core material which is continuously deposited on the continuously moving cover sheet and immediately passed through the pressure rolls and the board so formed continuously cut and removed from the machine and immediately entered into the drying kilns from which it emerges the finished product so that but little time is consumed from the initial stabilization of the air bubble walls to the completion of the finished product and the toughness and pliability of the air bubble walls is of more importance and more necessary to such an article than the permanency of the preservatives of the air bubble formation as is required in a slow setting article.

What I claim is:

1. A composition of matter comprising a cementitious material having an aggregate of bubbles incorporated therein to increase its normal bulk, the walls of said bubbles being reinforced with a colloidal agent from the group comprising gelatin, gum arabic, farinaceous paste, rice flour and dextrin to render them tough and pliable.

2. The process of producing a porous cement which comprises first forming a foam, stabilizing the same by the addition of a colloid to reinforce the walls of the bubbles constituting the foam thereby rendering said walls tough and pliable and the foam substantially non-collapsible, incorporating said foam as an aggregate in a plastic cement

mixture, and then allowing the same to harden.

3. A composition of material comprising a cement and an aggregate of bubbles having tough and pliable walls incorporated therein to increase the normal bulk and to decrease the normal weight of the cement, said bubbles resulting from a wet foam initially formed before being added to the cement and to which foam a colloid has been added prior to its incorporation with the cement to reinforce the walls enveloping the air bubbles with tough, pliable and substantially non-collapsing films.

4. The process of producing porous cement which comprises whipping an aqueous solution of a foaming agent into a foam or lather, preventing the subsequent collapse of said foam by the addition thereto of a gummy colloidal stabilizing agent, and thereupon incorporating said subsequents.

stantially non-collapsible foam into a slurry of a cementi-

tious substance capable of setting.

5. The process of producing a moldable cementitious product which comprises forming a foam, then rendering the walls of the bubbles of said foam tough and pliable by adding to said foam after formation a colloidal substance, and then mixing the foam with a cement.

CARLISLE K. Roos.

139 Exhibit No. 10-The Third Roos Foam Patent

Patented May 11, 1937 2,080,009
United States Patent Office
2,080,009. PLASTER WALLBOARD AND METHOD OF

MAKING IT

CARLISLE K. ROOS, FORT DODGE, IOWA, ASSIGNOR TO UNITED STATES GYPSUM COMPANY, CHICAGO, ILL.,
A CORPORATION OF ILLINOIS

No Drawing. Original application January 19, 1925, Serial No. 3,477, which is a continuation of application Serial No. 733,197, August 20, 1924. Divided and this application October 16, 1926, Serial No. 142,155. 18 Claims. (Cl. 154—2).

This invention relates to improvements in building material and more particularly to the production of cementitious material of a porous or cellular structure which is obtained by the use of confined gas as an aggregate, rather than gas as an expansive force to distend the volume of the cementi-

tious material during the setting process.

Cementitious material and particularly calcined gypsum has been employed for years as a finishing coat or covering for the interior walls of buildings, and has been molded into blocks to form partitions and tiles to form roofs and floors, it has also been employed as a filler in poured roofs and floors and as a core for plaster board and plaster wall board. as well as having been employed in other forms and articles. Calcined gypsum on account of its non-conductive and fire resisting qualities has been a desirable product for the purposes above described. In wall coverings the calcined gypsum has been used with sand as an aggregate to give it body for the first coats and a retarder to delay the setting so that it may be properly applied and in other cases fibre or sawdust has been added as an aggregate in lieu of the heavy sand aggregate which reduces the weight of the finished . product. In the formation of roofs, floors, tile, block and plaster board or wallboard the addition of fiber or sawdust

aggregate detracts from its fire resisting quality which is as desirable in these products as decreasing the weight of

the finished product.

To overcome this objection and produce such articles of calcined gypsum in which the weight is greatly reduced and in which the articles possess the qualities of unadulterated set gypsum, certain chemicals or minerals have sometimes been added to the dry calcined gypsum which will upon the addition of water evolve a gas causing the mixture to puff out or expand in volume and upon the setting of the gypsum will form a porous or cellular body so that the articles thus produced will be of less weight per volume and be as fire resisting and getter insulating mediums than unadultered

set gypsum.

It is an object of this invention to produce a porous or cellular body of set calcined gypsum without the use or addition of chemical gas evolving agents to the gypsum which react with the water to form an expanded plastic mass to be molded or otherwise formed into the required shape of the article desired. To this end an inert foam is formed comprising a plurality of minute bubbles of air the enveloping films of which are so individual in mass form that these air cells are in effect an aggregate and then as the calcined gypsum is being mixed with water, in the same manner as ordinarily employed to form the desired article, such inert aggregate of minute air bubbles is thoroughly incorporated in the plastic mass during the mixing process. The incorporation of the air or gas aggregate has the same effect upon reducing the density of the plastic mass as any other aggregate lighter in weight than the cementitious material itself and reduces density of the entire mass to give lighter weight per unit volume. Because the air or gas is so much lighter in weight than any solid aggregate the reduction in unit volume weights is correspondingly much greater and due to the fact that the air or gas is so thoroughly confined in such a tough film of a suitable film forming substance, the air or gas will remain confined during the mixing process of cementitious solid and water and thus permit of the novel aggregate being incorporated therein. Any amount of porosity or cellular structure desired can be produced and a definite size of porosity can be maintained, because the tough filmed bubbles of air or gas maintain their identity until the gypsum has set, and the

tough film envelope of the confined air or gas aggregate is replaced by a permanent set wall of cementitious material

with the air or gas still confined.

This application is a division of my application for Cementitious material, Serial No. 3,477, filed January 19, 1925, which is a continuation of my prior application Serial No. 733,197 filed August 20, 1924 (now U. S. Patent No. 2,017,022), which latter describes broadly the application of this principle of reducing the weight of articles made from cementitious material by the incorporation of a foam of minute air bubbles in the plastic mass and specifically describes the reinforcing of the air bubble enveloping films before the foam is mixed with the plastic mass. Patent No. 2,017,022 describes the foam as having a fine grained form and stabilized to such an extent that the foam might be preserved indefinitely. It also states that other reagents such as gelatin, dextrin and gum arabic added to the foam will reinforce the walls of the bubbles and produce a preservative effect.

In the formation of articles produced in accordance with the invention described in Patent No. 2,017,022 which are dried or set in the open air a foam of air bubbles suitably stabilized is desirable. In the formation of plaster board and other articles subjected to the heat of a drying kiln, a

foam with air bubbles stabilized by organic agents is
desirable. In articles where no external pressure is
applied, the air bubble walls may be readily reinforced as specifically described in my said patent by calcined gypsum or other inorganic agent which will harden
and produce a rigid and more or less fragile wall, and foam
bubbles so stabilized will act satisfactorily in such articles
but where external pressure is applied to air bubble foam
and cementitious material mixture the best result is obtained by a foam in which the walls of the air bubbles are
rendered tough and pliable.

In applying this invention to the manufacture of plaster wallboard such as made on a continuous machine like that described in the Utzman Patent 1,330,413, February 10, 1920, and afterwards dried in a drying kiln the foam is produced and then deposited upon the mixing belt where the calcined gypsum and water are mixed by the mixing fingers to form a homogeneous mass to be deposited upon the bottom cover sheet of the wallboard as it advances thereunder. It is seen that the addition of an inert foam at this step in the process of making wallboard is treating the foam in the same manner as any other aggregate that may be desired to be incorporated in the body of the core of the wallboard. In the course of formation of plaster wallboard on machines similar to the above referred to Utzman patent the

plastic mass deposited on the bottom cover sheet is advanced between pressure rolls as the top cover sheet is applied, the pressure so applied to the plastic mass collecting in front of the rolls spreads it out to form a core between the top and bottom cover sheets of even thickness between the edges.

In such an application of this invention the first step is to prepare a solution capable of being converted into a foam by agitation. There are several types of reagents which will produce such a foaming solution or mixture such as solutions, mixtures, or emulsions of flotation oils, various organic compounds similar to soap, saponin, soap bark, albumens, licorice, etc. The efficacy of the above mentioned reagents of course varies considerably and it has been found that a water solution containing up to three percent of powdered soap bark produces satisfactory results. Such a solution of soap bark and water may be agitated or converted

into a foam in the same manner as eggs or cream.

Immediately after the formation of satisfactory foam a relatively small quantity of gelatin, dextrin, gum arabic or other organic colloid such as rice flour or other farinaceous paste is added and stirred into the foam thoroughly. The addition of this colloidal agent will reinforce the film enveloping the air bubbles so that each bubble will have tough and pliable walls and enable the bubbles to form an aggregate that may be substituted for solid aggregate. The thus stabilized foam is then deposited on the mixing belt of the machine and stirred into the mixture of water and calcined gypsum thereon by the mixing fingers until the whole is a homogeneous mass as it is deposited on the advancing covering sheet. The walls of the air bubbles incorporated in the plastic mass being tough and pliable not only remain intact during the mixing with the cementitious material and water but are not broken or changed in volume and the aggregate formation is maintained in passing through the pressure rolls as the board is formed. The quantity of foam incorporated into the wet mass on the mixing belt will of course determine its cellular structure, and this in turn determines the bulk and weight of the finished product. The wallboards so formed are quickly dried by passing through a drying kiln as they are removed from the discharge end of the machine.

In such an application of this invention the foam is continuously formed, stabilized and immediately incorporated into the plastic core material which is continuously deposited on the continuously moving cover sheet and immediately pared through the pressure rolls and the board so formed continuously cut and removed from the machine and imme-

diately entered into the drying kilns from which it emerges the finished product so that but little time is consumed from the initial stabilization of the air bubble walls to the completion of the finished product and the toughness and pliability of the air bubble walls is of more importance and more necessary to such an article than the permanency of the preservatives of the air bubbles formation as is required in a slow setting article.

What I claim is:

1. The process of producing cellular cementitious products which comprises making a fine-grained foam from a solution containing foam-producing agents, thereupon stabilizing said formed foam by the addition of organic colloidal stabilizing agents, then adding said stabilized foam to a slurry of gauging fluid and cementitious substance, and then molding the resultant mixture.

2: The process of producing cellular cementitious products which comprises whipping a comparatively freely fluid solution containing a foaming agent into a fine-grained foam, adding to said foam a soluble organic colloid capable of stabilizing said foam, adding the thus stabilized foam to a slurry of gauging fluid and cementitious substance, and

molding the resultant mixture.

3. The process of producing a plasterboard having a cellular core which comprises whipping a comparatively freely fluid solution of a foaming agent into a fine-grained foam, adding to said foam a water soluble organic colloid capable of stabilizing said foam and of rendering the walls of the air bubbles of said foam resistant to crushing by pressure, gauging calcined gypsum with water, adding aforesaid stabilized foam to the gauged gypsum, passing the thus prepared mixture through a plasterboard machine, allowing the gypsum to set, and drying the resulting plasterboards.

4. The process of making cellular insulating material comprising aerating a starch paste, mixing finely divided calcined gypsum with water to hydrate the same, uniformly mixing the aerated starch with the gypsum slurry, bringing the mass into the desired shape and drying the same.

5. The process of making insulating material which comprises incorporating a foam into a starch paste, adding water to finely divided calcined gypsum, intimately mixing the foam-containing starch with the gypsum slurry, giving the mass the desired form and drying the same.

6. In the process of making insulating material the step which comprises incorporating an aerated starch in a gyp-

sum slurry.

7. The process of making wall board which comprises mixing a dense foam with a starch paste to expand the latter and form cells therein, adding the mixture to a slurry of calcined gypsum, placing the mass between sheet

liners and drying the same.

8. The process of making wall board which comprises forming a dense foam, uniformly mixing the same with a starch paste to expand the latter and form cells therein, adding water to finely divided calcined gypsum in quantity sufficient to hydrate the same and before the latter begins to set intimately incorporating the starchfoam mixture therein, placing the mass between paper liners and drying the same.

9. The process of making insulating material comprising emulsifying a starch paste with air, mixing the starch emulsion with a/slurry of gypsum, giving the mass the

desired form and drying the same.

10: A plaster board having a porous body comprising a hardened cementitious material enclosing a plurality of voids encased in tough pliable films.

11. A plaster board having a light weight porous body of hardened cementitious material enclosing a plurality of minute voids each enveloped in a tough pliable colloidal casing.

12. The process of producing a plaster board having a porous body comprising the formation of an aggregate of minute gas cells encased in tough pliable envelopes, adding the aggregate to calcined gypsum and water, thoroughly mixing therewith, passing the homogeneous mixture through a plaster board machine and removing the moisture from the plaster boards so formed.

13. The process of manufacturing plaster boards having a porous body comprising the production of fine grained gaseous aggregate consisting of minute colloidal film encased individual bubbles, incorporating the aggregate in the plastic body material, passing the mixture through a plaster board machine and allowing the plaster boards so formed to harden, the tough pliable casings of the bubbles maintaining their individuality during the process.

14. A wallboard comprising a porous body of hardened cellular cementitious material enclosing a plurality of voids voids encased in tough pliable films, and cover sheets between

which said cementitious material is interposed.

15. A wallboard comprising a porous body of hardened cellular cementitious material enclosing a plurality of voids encased in tough pliable films, and cover sheets between which said cementitious material is interposed and to which said cover sheets are bonded.

0.7

16. A wallboard comprising a porous body of hardened cellular cementitious material enclosing a plurality of voids encased in tough pliable films, and cover sheets applied to said cellular cementitious material while in a plastic condition and to which said cover sheets are bonded when the plastic cementitious material hardens.

17. A wallboard comprising a porous body of hardened cellular cementitious material enclosing a plurality of voids encased in tough pliable films, and cover sheets therefor which are applied by means of pressure when said cementitious material is in a plastic state whereupon said cover sheets remain bonded to said cementitious material

after the same has set and hardened.

18. The process of manufacturing wallboard having a cellular cementitious core which comprises the production of a fine grained foam consisting of a plurality of voids encased in tough pliable films, incorporating said foam in the cementitious material in a plastic state, passing the mixture through a plasterboard machine whereupon coversheets are applied to said mixture through the application of pressure, and allowing the same to harden whereby the cover sheets become bonded to the cementitious cellular core and the tough pliable casings of the bubbles maintain their individuality.

CARLISLE K. Roos.

# 143 Exhibit No. 11—The Metallized Board License Agreement Between U.S.G. and Ebsary

# 144 PLASTER BOARD AGREEMENT

This agreement, made and entered into this 14th day of August, A. D. 1935, by and between United States Gypsum Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois and having its principal place of business at 300 West Adams Street, Chicago, Illinois, hereinafter referred to as the "Gypsum Company," and Ebsary Gypsum Company, a corporation organized and existing under and by virtue of the laws of the State of New York and having its principal place of business at 52 Vanderbilt Avenue, New York, New York, hereinafter referred to as "Licensee," witnesseth:

Whereas, Gypsum Company is the owner of United States Letters Patent to Roos No. 1,914,345, relating to wall construction, and is also the owner of certain patent rights set forth in Schedule A hereunto annexed, relating to building structures or elements for said structures; and

Whereas, Licensee desires an indivisible and non-exclusive license from Gypsum Company, under the terms and conditions hereinafter set forth and as hereinafter specified, to manufacture, use and sell plaster board under said Roos Patent No. 1,914,345 and under said patent rights set forth in said Schedule A; and

Whereas, Gypsum Company is willing to grant such license, under the terms and conditions hereinafter set

forth and as hereinafter specified,

Now, therefore, in consideration of the premises, the sum of One Dollar (\$1.00) in hand paid, receipt 145 of which is hereby acknowledged by Gypsum Company, and the mutual covenants herein contained, it is hereby agreed as follows:

I

Gypsum Company hereby represents and warrants that it has the right to grant the license hereby granted.

#### H

The term "plaster board," as herein used, is intended to include material commonly known as plasterboard and also materials known as plaster wall board, plaster lath, and plaster sheathing boards.

# Ш

Gypsum Company has agreed to and does hereby give and grant unto Licensee the indivisible, non-exclusive right, license and privilege to make, use and sell plaster board having a metallized surface embodying the inventions disclosed and claimed in said Roos Patent and in the patents or patent applications set forth in Schedule A, or in any of them; Provided, However, that the right, license and privilege herein and hereby granted is specifically limited to the plaster board and building structures incorporating the same as set forth in said Schedule A, and does not extend to any other product or structure.

#### IV

(a) It is expressly understood and agreed that the indivisible and non-exclusive rights, licenses and privileges aforesaid are granted, and they are hereby accepted, upon the express condition that Gypsum Company shall have, and it hereby reserves, the right to determine and fix at any time, and to change from time to time, during the existence of said patents and so long as said rights,

licenses and privileges granted hereunder shall continue, the minimum price or prices at which Licensee shall or may sell plaster board having a metallized surface which is covered by said Roos Patent or any of the said patents set forth in Schedule A, or which shall embody the inventions or improvements set forth and claimed in any patents issued upon any of the applications for patent set forth in said Schedule A, provided that the right hereinabove reserved to determine and fix the minimum price or prices of any such plaster board shall not be exercised with respect to any such plaster board embodying only the inventions or improvements, or one or more of them, set forth and claimed in any of the applications for patent set forth in said Schedule A, prior to the date when the patent or patents shall have been granted or issued upon

such application or applications, respectively.

(b) In the event Gypsum Company shall exercise the right thus reserved, namely, to determine and fix at any time, and to change from time to time, such minimum price or prices, it shall notify Licensee of its election to exercise such right, and shall include in such notice, or accompany such notice by, a statement of such minimum price or prices at which Licensee shall or may sell said plaster board having a metallized surface, manufactured by Licensee, and thereafter shall give Licensee written or telegraphic notice of any change in such price or prices; and Licensee expressly covenants and agrees that it will not, so long as this agreement shall continue in force and effect, after receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly, sell or offer for sale any plaster board having a metallized surface manufactured by said Licensee embodying the inventions and improvements set forth in said Roos Patent

A, or embodying the inventions or improvements set forth and claimed in any patents issued upon any applications for patent set forth in said Schedule A, at a price or prices less than that stated by Gypsum Company in said notice or in any such written or telegraphic notice of change in said price or prices. The said minimum price or prices at which Licensee shall or may sell said patented products as determined and fixed by Gypsum Company may be the same for all classes of trade, provided that Gypsum Company may, at any time and from time to time, determine and fix different prices for different classes of trade. It is further understood and agreed that any such minimum price or prices so determined and fixed

by Gypsum Company may be made with respect to each trade market or place where said plaster board having a metallized surface may be sold, and may also be made with respect to different quantities purchased, such as carloads, less than carloads and truck loads; and that such minimum price or prices may differ in amount in each different market or place according to market conditions or quantities, all as may be determined by Gypsum Company.

(c) The said minimum price or prices so determined and fixed from time to time by Gypsum Company shall not be more than the respective price or prices at which Gypsum Company itself determines to sell such products embodying the said inventions and improvements hereinbefore mentioned, to its own like trade in the same

market.

(d) It is understood and agreed that all orders, contracts, or commitments for the future sale of said plaster board having a metallized surface and embodying the inventions and improvements hereinbefore mentioned shall be made subject to establishment of, and/or change in, such minimum price at which said materials or products may be sold, and that all shipments thereof shall be

made at no less than the minimum price or prices 148 contained in any notice of establishment of, and/or change in, price or prices received before shipment; provided, however, that on all orders taken for immediate shipment at not less than the minimum price, if any, then in effect, shipment thereof may be made at the price at which taken within five days of the date of such order; provided, further, that written contracts may be made at not less than the minimum price, if any, then in effect, to furnish such patented material for any specific work or job then contemplated or under construction; Provided: Further, that where contracts for specific work or jobs have been let to general contractors before notice of establishment of, and/or change in, price, then Licensee, if it has made a commitment for any such specific work or job prior to such notice, may at any time within thirty (30) days after such notice make a written contract to furnish the material for such specific work or job, at the price at which it was committed, but not less than the minimum price, if any, in effect at the time of such commitment. Within ten (10) days after each notice of minimum price or change thereof, Licensee will furnish to Gypsum Company a written statement of all specific work or jobs,

contracts and commitments which Licensee had at the time such notice was given, showing the date of the contract or commitment, name of purchaser, location and description of specific work or job, quantity of material, and price at which the same was sold or commitment made, and shall immediately notify Gypsum Company of the making of any such contract for such specific work or job within the thirty-day term hereinbefore mentioned, and of the completion or abandonment of all specific work, jobs, contracts and commitments theretofore had by Licensee. It is understood and agreed that no such

149 contract or commitment shall be recognized as valid hereunder, unless the contract or commitment shall have been made in good faith before notice of making a price or change thereof, and unless such contract or commitment shall have been for some specific work or job then contemplated or under construction in which such patented material specified in the said contract or commitment is to be furnished or installed.

#### V

As consideration for the rights, licenses, and privileges herein granted to Licensee, Licensee agrees to pay royalty to Gypsum Company for all plaster board having a metallized surface manufactured and sold by Licensee and which are covered by claims of said Roos patent or patents set forth in the said Schedule A, or patents which may be issued under any of the applications set forth under said Schedule A, or which are to be used in making structures covered by said patent rights, at the rate of forty cents (40e) per thousand square feet surface area where only one face is metallized, and at the rate of fifty cents (50e) per thousand square feet where both faces are metallized, on any product covered by any of the patent rights aforesaid.

## VI

It is expressly understood that Licensee shall have no right, without the written consent of Gypsum Company first obtained, to manufacture any of said patented material for any other manufacturer of plaster board, whether or not licensed under said patents, or to sell such patented material to any other such manufacturer, or to deliver any of the same to any person, firm or corporation whatsoever on consignment.

### VII

It is expressly understood and agreed that the rights, licenses and privileges, herein granted are and shall be personal to Licensee, and none of said rights, licenses and privileges, nor any right herein or thereunder, shall be sold, assigned, or transferred without the written consent of Gypsum-Company first obtained, nor shall Licensee permit the same, or any of them, to be transferred by operation of law; Provided, however, that such rights, licenses, and privileges may be assigned by Licensee to any company acquiring all of the business. and assets of said Licensee, on condition that Licensee shall first obtain an agreement in writing from any such assignee, in which such agreement such assignee agrees to assume all of the obligations of Licensee under this agreement and agrees to be bound by all of the terms and conditions hereof, and shall deliver such agreement to Gypsum Company.

#### VIII

In the event Gypsum Company shall, subsequent to the effective date hereof, grant to any other person, firm or corporation, any license under said Roos Patent or under said patents or applications for patent set forth in said Schedule A, for the manufacture, use, or sale of plaster board having a metallized surface, and embodying the claims or inventions set forth and claimed in said patents or said applications for patent, upon terms more favorable than those granted hereunder to Licensee, then Gypsum Company will grant to Licensee a license upon the same terms, or will extend to Licensee the same right granted to such other licensee.

#### IX

Licensee agrees to keep true and accurate books of account, showing the total amount of plaster board having a metallized surface manufactured and/or sold by Licensee under the rights, licenses and privileges herein granted, and the prices at which the same have been sold. Such books and records shall at all times during business hours be open to the inspection of Gypsum Company or its duly authorized representatives. Gypsum Company shall have the right to make copies of any of such records and make memoranda therefrom, provided that if at the time of such examination Licensee shall so request, such examination shall be made by a certified

public accountant satisfactory to Gypsum Company, in which event the expense of such examination by the said certified public accountant shall be borne by Licensee.

#### X

Licensee agrees that on or before the fifteenth day of each calendar month it will furnish to Gypsum Company a written report, under the hand and verification of some officer or other duly authorized agent of Licensee, showing the total amount of plaster board having a metallized surface sold by Licensee during the preceding calendar month and which was manufactured by Licensee under the rights, licenses and privileges herein granted, and also showing whether such plaster board had one or two metallized surfaces, together with the prices at which the same shall have been sold, and at the time of furnishing such report, Licensee will pay to Gypsum Company the full royalty as herein provided for such plaster board having a metallized surface so sold by Licensee during such preceding calendar month. Such reports shall be furnished to Gypsum Company at its principal office, at Chicago, Illinois.

#### XI

Licensee expressly covenants and agrees that all sales by Licensee hereunder of plaster board having a metallized surface shall be bona fide sales thereof, and Licensee 152 further expressly covenants and agrees that no such products shall be placed on consignment. For the purposes of this agreement, a sale shall be considered to have been made not later than the date on which the goods are shipped.

## XII

Licensee agrees that all plaster board having a metallized surface sold by it hereunder shall be numbered with the respective numbers of any appropriate patents under which the rights, licenses and privileges herein granted are granted, and covering the manufacture, sale, or use thereof. Gypsum Company shall have the right from time to time to specify the substance of the notice with which said products shall be so marked.

## XIII

As one of the considerations for the indivisible and non-exclusive rights, licenses and privileges herein and hereby granted to Licensee, Licensee agrees that it will not at

any time during the life of this agreement, or during the existence of said rights, licenses and privileges, directly or indirectly, by itself or through or together with another or others, contest the validity of said letters patent, or of said patent rights, or of any letters patent hereafter issued upon said applications so set forth in said Schedule A, or the right or title of Gypsum Company therein or thereto as herein or as in said Schedule A set forth, but in the event that any of said patents under which Licensee is licensed hereunder is held invalid or of limited construction by a court of competent jurisdiction from whose decision no appeal is or can be taken, then the Licensee shall have the right to make, use or vend the structure so held to be outside of the scope of said patent rights, free and

clear of the terms of this agreement.

or action which shall be brought against it in consequence of practicing the inventions set forth in said patents and said patent rights, and thereupon, if Gypsum Company shall desire to conduct the defense of such suit or action, it shall have the right to do so, but Licensee shall have the right, in such event, to be represented in such suit or action, at its own expense, by counsel of its own selection. Gypsum Company shall not, by undertaking to conduct the defense of any such suit or action, be under any obligation to indemnify the Licensee against any judgment, order or decree or other result therein.

#### XIV

(a) In the event Licensee shall fail to make any report or shall fail to pay the royalty herein provided to be paid. or in the event that Licensee shall sell any of the materials covered by the price restriction provisions of Paragraph IV hereof, at a price or prices lower than the specified price or prices established and fixed by Gypsum Company as herein provided, Gypsum Company shall have the right to cancel all of the rights, licenses and privileges herein granted to Licensee; provided, however, that Licensee shall not be relieved thereby from any liability accrued at the time of such cancellation. In the event of any such breach, Gypsum Company shall give written notice to Licensee of the default or defaults claimed by Gypsum Company to have occurred, and of the desire of Gypsum Company to cancel the rights, licenses and privileges of Licensee hereunder; and if Licensee shall not make good the default or defaults complained of within a period of thirty (30) days from the giving of such

notice, then all of the rights, licenses and privileges of Licensee hereunder shall forthwith cease and terminate without further action on the part of Gypsum Com-

pany; provided, however, that if, upon the giving of any such notice, Licensee shall deny that the defaults, or any of them, complained of have occurred, then the question as to whether the default or defaults, the occurrence of which is so denied by Licensee, have in fact occurred, shall be referred to arbitration under Paragraph

XV hereof.

(b) In the event that such arbiters find that such default or defaults have occurred, then Licensee shall promptly cure the same, and in any event shall cure the same within thirty (30) days from the date of the finding of such arbiters; and in the event such default or defaults shall not be so cured within the time limited, then the rights, licenses and privileges herein granted to Licensee shall forthwith cease and determine without further action on the part of Gypsum Company; the termination of said rights, licenses and privileges following the finding of the arbiters as aforesaid shall not release Licensee from any liability then existing.

(c) In the event (1) that Licensee shall be adjudicated a bankrupt, or (2) a receiver shall be appointed for Licensee, whose appointment shall not be vacated within sixty (60) days thereafter, then the rights, licenses and privileges herein granted to Licensee shall forthwith cease and determine, without further action on the part of Gypsum Company, provided that such termination shall not relieve

Licensee of any and all liability then existing.

(d) The waiver by Gypsum Company of any breach on the part of Licensee shall not be interpreted as constituting

a waiver of any further or other breach or breaches.

(e) In the event any default shall have occurred as specified in sub-paragraph (a) of this Paragraph XIV, Gypsum Company may give notice of such default without stating its desire to terminate the rights, licenses and privi-

leges herein granted to Licensee, and in the event such defaults shall not be cured by Licensee within the times mentioned in said sub-paragraph (a), Gypsum Company shall have the right, without terminating the said rights, licenses and privileges herein granted to Licensee, to maintain any appropriate action hereunder, at law or in equity, for the collection of license fees or royalties, or for damages, or for any other remedy as may be appropriate. The provisions mentioned in said sub-paragraph

(a) with respect to arbitrating the fact as to whether any default or defaults complained of has or have in fact occurred, shall be applicable in all respects in the event notice of default is given without any statement by Gypsum Company of its desire to terminate the rights, licenses and privileges herein granted to Licensee, excepting that if the arbiters shall find that any of said defaults complained of shall have occurred, then Gypsum Company shall have the same right, without a termination of said rights, licenses and privileges so granted to Licensee, to maintain its appropriate action hereunder.

#### XV

Any question subject to arbitration under any provision of this contract shall be arbitrated in accordance with the rules then obtaining of the American Arbitration Association. The finding or findings of the arbiters with respect to the occurrence or non-occurrence of any claimed default, shall be final and conclusive. In the event the finding or findings of the arbiters shall be with respect to any default or defaults, or claimed default or defaults, in the payment of royalties or other sums of money herein required to be paid by the Licensee to Gypsum Company and the arbiters shall find that such default or defaults shall have occurred, the arbiters shall in their finding fix and determine the amount of royalties or other sums of money

due from License to Gypsum Company, whereupon
Licensee will promptly pay the same to Gypsum
Company, and in any event will pay the same within
the times hereinbefore mentioned in Paragraph XIV hereof
for the curing of defaults, provided that Gypsum Company
shall have the right (but without being limited to such
remedy) to have a summary judgment entered in its favor
against Licensee for the amount so found to be due by the
arbiters in any court of competent jurisdiction.

#### XVI

Any notice to be given under the terms hereof may be served by either party by mailing such notice to the other party hereto, by registered mail, postage prepaid, addressed to such party at its last known principal office, and the deposit of any such notice in the United States mails, registered, postage prepaid, and so addressed, shall constitute service of notice hereunder. Any telegraphic notice given under Paragraph IV hereof shall be confirmed in writing. Either party may change, from time to time, the address

to which all notices shall be mailed, provided that in the absence of any different address, the respective addresses herein first above stated shall be the addresses to which such notices shall be mailed.

#### XVII

Except as herein otherwise expressly provided, this agreement shall remain in force for the full term of each patent under which the respective rights, licenses and privileges are hereby granted, and shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns, provided, however, that nothing in this Paragraph XVII contained shall be construed to permit any assignment hereof or of any of the rights, licenses, and privileges herein granted, except as herein otherwise specifically

provided. Nothing herein contained shall be construed as extending any license for the manufacture and/or use and/or sale of plaster board not having a metallized surface heretofore or hereafter granted under

any other agreement between the parties hereto.

In the event that the exclusive right and license of the Gypsum Company, as set forth in said Schedule A hereto, shall for any reason whatsoever (whether on account of the default of the Gypsum Company or otherwise) terminate, and such termination shall have the effect of terminating or shall result in the termination of any of the rights, licenses and privileges herein granted to the Licensee, then this agreement shall immediately terminate, without further act on the part of either of the parties hereto, provided that Licensee shall not be relieved thereby from any liability then existing, and provided further that Gypsum Company shall not be liable in any way to Licensee on account of such termination. Gypsum Company agrees that if its said exclusive right and license shall so be terminated, it will promptly notify Licensee of such termination.

# XVIII

Anything hereinabove contained to the contrary notwithstanding, this agreement and the rights, licenses and privileges herein granted to the Licensee may be cancelled and terminated, at any time, by either party hereto, by at least ninety (90) days' prior written notice to the other party of the election of the party serving the notice to exercise such right of cancellation and of the date on which such cancellation shall be effective, but such cancellationshall not relieve either party from any liability accrued or due at the date of such cancellation; Provided, However, that if Gypsum Company shall exercise the right to cancel this agreement as in this paragraph provided, then within

ninety (90) days of its said notice it will submit to Licensee a new contract embodying a proposal for a non-exclusive license under said patents for the life of said patents, for acceptance by Licensee within ten (10) days from the date of such submittal.

to be hereunto affixed, in duplicate, the day and year first

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate seals

above written.

UNITED STATES GYPSUM COMPANY,

By C. F. HENNING, Its Vice President.

Attest:

[Sear]

C. H. SHANER, Secretary.

EBSARY GYPSUM COMPANY, INC., By F. G. EBSARY, Its President.

Attest:

GEORGE N. LENCI, Secretary.

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# Schedule A to agreement

The Gypsum Company has the exclusive right and license to make, use and sell building structures or elements for building structures where insulation is obtained by the use of plaster board having a metallized surface under the following patents and applications for patents known as the Alfol patents.

#### Patenta

Inventor	, Patent No.	Issue Date.
E. Schmidt, et al E. Schmidt Eduard Dyckerhoff	1,757,479 1,890,418 1,934,174	May 5, 1930 Dec. 6, 1932 Nov. 7, 1938
	Applications	
Inventor	Ser. No.	Filing Date
Schmidt, et al Eduard Dyckerhoff Ernst Schmidt	105,753 442,219 663,572	April 30, 1936 April 7, 1930 March 30, 1933

together with any divisions, continuations, renewals or re-issues thereof, but is understood that the term "building structures" is <u>limited</u> to the walls, floors, roofs- and ceilings of buildings and does not include pipes or ducts or other heating apparatus installed in the building or refrigerating or cooling apparatus or structures whether built into the building or not, and it is further understood that Gypsum Company has no right or license under said patents or applications to use metal foil for insulators except where such foil is applied to a non-metallic member as a facing therefor.

160 Exhibit No. 12—The Perforated Lath License Agreement Between U.S.G. and Certain-teed

Agreement made this 8th day of June, 1936, by and between United States Gypsum Company, an Illinois corporation, having its principal office and place of business at Chicago, Illinois, hereinafter referred to as "Licensor", and Certain-teed Products Corp., a Maryland corporation, having its principal office and place of business at New York, N. Y., hereinafter referred to as "Licensee"; witnesseth:

Whereas, Licensor is the owner of Letters Patent of the United States No. 1,938,354, relating to a plasterboard lath particularly adapted for the fire-resistant wall and ceiling constructions and structures, covered by the claims of said patent, and Licensee desires to be licensed to manufacture, use and sell such patented plasterboard lath;

Now, therefore, in consideration of the sum of One Dollar (\$1.00) in hand paid, each to the other, the receipt whereof is hereby acknowledged, and of the mutual covenants herein contained, the parties hereto agree as follows:

1. Licensor hereby grants to Licensee, subject to the terms and conditions hereinafter set forth, an indivisible and non-exclusive right, license and privilege of manufacturing at the plants and factories now or hereafter owned by Licensee or any of its wholly owned subsidiaries, perforated plasterboard lath having a gypsum core and paper covering adhering thereto embodying the inventions and improvements set forth and claimed in said Letters Patent of the United States No. 1,938,354, and of selling and using, in the United States of America and the territories and possessions thereof, said perforated plasterboard lath manufactured by Licensee at its said plants and factories, or the said plants or factories of its subsidiaries, for the

full term of said Letters Patent and any extensions or reissues thereof, subject, however, to cancellation or termination as hereinafter provided.

2. The license above granted, to manufacture, use and sell perforated plasterboard lath embodying the inventions

and improvements of said Letters Patent, is granted on condition that Licensor reserves the right to determine, change and/or withdraw at any time and from time to time, during the term of this agreement, the minimum price or prices and/or-terms and conditions of sale at which Licensee shall sell or offer for sale any such perforated plasterboard lath, and in case Licensor shall exercise the right so reserved, it shall first serve upon Licensee written notice of such minimum price or prices and/or terms and conditions of sale, and shall thereafter give to Licensee written or telegraphic notice of any change or changes in or withdrawal of such price or prices and/or terms and conditions of sale; and Licensee expressly covenants and agrees that after notice of any such price or prices and/or terms and conditions of sale or any change therein, it will not, directly or indirectly, sell or offer for sale any such perforated plasterboard lath at a price or prices less than those, or upon terms and conditions of sale other than as, stated by Licensor in such written notice or any such written or telegraphic notice of a change in such price or prices and/or terms and conditions of sale. Such minimum price or prices and/or terms and conditions of sale so determined by Licensor and any change or changes therein may be with respect to any one or more, or all, classes of trade, markets, or methods of shipment or delivery, and may be the same or different with respect to different classes of trade, markets, or methods of shipment or delivery, all as may be determined from time to time by Licensor. All orders, contracts or commitments for future sale or delivery of any such perforated plasterboard lath shall be made subject to change in such minimum price or prices and/or terms and conditions of sale as above provided, and no shipments thereof may be made at less than

the minimum price or prices or upon terms and conditions of sale other than as, contained in the last such notice of minimum price or prices and/or terms and conditions of sale, and the last notice of change or changes

therein, received before shipment.

Said minimum price or prices shall not be more than that price, nor shall such terms and conditions of sale be other than those, at which Licensor determines to sell such perforated plasterboard lath embodying the inventions and improvements set forth and claimed in said Letters Patent, to its own like trade in the same market.

3. Notwithstanding any other provisions of this agreement, it is a condition and limitation of the licenses above

granted that Licensee may not sell any of said perforated plasterboard lath to other manufacturers, jobbers or whole-salers without the written consent of Licensor, and then only at the minimum price or prices fixed and determined by Licensor therefor, as provided in Section 2 hereof; that Licensee shall not deliver any of said perforated plasterboard lath to any person or company on consignment; and that Licensee may not use or sell any of said perforated plasterboard lath of inferior manufacture and commonly known as "seconds".

4. All such perforated plasterboard lath shall be plainly marked by Licensee, "Licensed under United States Letters

Patent No. 1.938,354."

5. As consideration for the grant of the aforesaid rights, licenses and privileges, Licensee agrees to pay to Licensor a royalty or license fee at the rate of ten cents (10¢) per thousand square feet of all said perforated plasterboard lath sold or used by Licensee during the term of this agreement, which shall be paid monthly to Licensor on or before the 20th day of each calendar month for all of said perforated plasterboard lath sold or used by Licensee during the next preceding calendar month, as hereinafter more

specifically set forth.

all perforated plasterboard lath manufactured by Licensee and sold for erection in said patented wall and ceiling constructions, and structures shall be conclusively treated as perforated plasterboard lath manufactured in accordance with the claims of said patent; and all perforated plasterboard lath shall be considered sold on the date shipped or delivered to purchaser, whether or not title passes at the time of shipment or delivery.

The royalties or license fees payable by Licensee under this license shall be in addition to any royalties or license fees payable by Licensee for any license under any other patents which may have been granted heretofore by Li-

censor to Licensee.

6. Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of all of said perforated plasterboard lath manufactured, sold or used by it, and agrees that on or before the 20th day of each calendar month it will render unto Licensor true written returns, verified under oath by an officer or other agent of Licensee, setting forth the quantity of all of said perforated plasterboard lath manufactured, sold or used by it during the preceding calendar month, together with

the price or prices at which the same was sold, such returns to be delivered to Licensor at its office in Chicago, Illinois, and Licensee agrees to pay to Licensor on or before the 20th day of each calendar month, at the office of Licensor at Chicago, Illinois, the hereinbefore stipulated royalties or license fees which may then be due under this agreement on account of all of said perforated plasterboard lath sold or used by it during the next preceding calendar month.

7. Licensor or its duly authorized representative shall have the right at all reasonable times during business hours to inspect such books of account and records of Licensee as are necessary to determine the quantity of such perforated

plasterboard lath manufactured, sold or used by it, the price or prices at which the same was sold, and 165 to make copies thereof and memoranda therefrom; provided, however, that if at the time of any such examination Licensee shall request it in writing, then such examination shall be made by a certified public accountant agreed upon between the parties hereto, in which event the expense thereof shall be borne by Licensee. If the parties at any such time shall not agree upon a certified public accountant to make such examination, then Licensor shall name three certified public accountants of good standing, not directly or indirectly employed by it or in any other way connected with it, and Licensee shall have the right to select which of them shall make such examination, and if Licensee shall not accept any of them within ten (10) days after receiving the names thereof from Licensor, then Licensor shall have the right to make such examination itself.

8. As one of the considerations of this agreement, Licensee hereby acknowledges the validity of Letters Patent of the United States No. 1,938,354, and agrees that it will not, during the existence of this agreement, directly or indirectly, either alone or through or together with another or others, contest the validity of such Letters Patent or any of the claims thereof, or the title thereto of Licensor. The granting of the license herein contained shall not be construed or deemed to grant to Licensee any license under any other letters patent owned by Licensor or under which it is licensed with a right to license others. Nothing herein contained shall be construed to permit Licensee to use, at any time, any of Licensor's trade marks or names.

9. In the event either party hereto shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements herein to be kept or performed by it, then the other party may at its election serve upon the party

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claimed to be in default, notice of termination of this agreement, which notice shall specify the neglect, failure 166 or refusal, and if within thirty (30) days from the date of delivery of said notice the party claimed to be in default shall not have cured all the defaults specified in said notice, then this agreement shall terminate without the necessity of any other or further notice and without the necessity of any court action; provided, however, that neither party shall be relieved thereby of any liability accrued at the time of such termination. A waiver by either party hereto of any breach by the other party shall not be deemed or construed to be a waiver of any other or subsequent breach or breaches hereof.

10. In case at any time Licensee shall be adjudged bankrupt or insolvent, or a receiver appointed for its assets and business, or its assets assigned for the benefit of creditors, then Licensor may at its option cancel this agreement with or without notice, but in any such event Licensor shall not thereby be prevented from collecting any and all license fees or royalties accrued hereunder at the time of such

termination.

11. In the event Licensor grants to any other person, firm or corporation, a license similar to this license under said letters patent to manufacture, use and sell said perforated plasterboard lath under more favorable terms or conditions than stated herein, Licensor shall immediately give notice thereof to Licensee, and grant to Licensee a license on such terms and conditions, or amend this agreement so as to extend such more favorable terms and conditions to Licensee during the time they are enjoyed by such other person, firm or corporation.

12. The licenses herein granted are personal to Licensee, and the same or any right therein or thereunder shall not be sold, assigned, or transferred without the written consent of Licenser first had and obtained; and if this agreement or any of Licensee's rights hereunder are transferred by operation of law, then Licensor may cancel this agreement

at any time thereafter, with or without notice.

13. This agreement shall continue in force and effect for the full term of said letters patent and any extensions or reissues thereof; provided, however, that the same may be canceled or terminated by either party hereto upon giving to the other of said parties one year's written notice of its intention to cancel or terminate the same. Upon the giving of such notice this contract and all of the provisions hereof, together with said license, shall,

at the end of six (6) months from the end of the period stated in such notice, be and become canceled and terminated without the necessity of any further notice by either party hereto. Licensee, by reason of any such cancelation or termination, shall not be relieved from the payment of any royalties or license fees payable hereunder for all of said patented perforated plasterboard lath sold or used by it up to the date of final cancelation or termination hereof.

14. Any and all notices required to be served hereunder upon Licensor may be served by mailing a copy thereof, postage prepaid, registered mail, addressed to Licensor at 300 West Adams Street, Chicago, Illinois; and any and all notices required to be served hereunder upon Licensee may be served by mailing a copy thereof, postage prepaid, registered mail, addressed to Licensee at 100 E. 42nd St., New York, N. Y.; and such mailing of notice shall constitute proper service of notice hereunder.

15. This agreement shall be binding upon and enure to the benefit of the successors and assigns of the parties hereto; provided, however, that nothing herein contained shall be construed to permit any assignment of this agreement or of any rights hereunder except as hereinabove

specifically provided.

In witness whereof, the parties hereto have hereunto caused these presents to be signed on their behalf by their respective presidents, attested by their respective sec-

retaries, and their corporate seals hereunto affixed, all done the day and year first above written.

UNITED STATES GYPSUM COMPANY,

[SEAL] By C. F. HENNING,

Attest:

C. H. SHANER, Secretary.

Vice-President.

CERTAIN-TEED PRODUCTS CORP.,
By CHESTER E. RAHN,

President.

AUGUST SHERTHON, Secretary.

Attest:



169 In the District Court of the United States for the District of Columbia

[Title omitted]
[File endorsement omitted.]

Motion for a more definite statement or bill of particulars Filed Nov. 18, 1940

Upon the complaint herein, the defendants, having united in this motion for the convenience of the Court, hereby respectfully move this Court as follows:

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For an order, pursuant to Rule 12(e) of the Rules of Civil Procedure for the District Courts of the United States, directing plaintiff to furnish a more definite statement, or a bill of particulars, with respect to the following matters, upon the ground that the complaint is defective in that such matters, in the absence of the details hereby requested, are not averred with sufficient definiteness or particularity to enable the defendants properly to prepare their answers or to prepare for trial:

1. Specify the miscellaneous gypsum products referred to in paragraph 40, in the first sentence of paragraph 44, in paragraphs 45(c) and (d), in the second and last sentences of paragraph 95, in paragraphs 103, 104, 106, 107, 121 and 123, respectively.

of the complaint.

2. Identify the "various small manufacturers of calcined gypsum and plaster not engaged in the manufacture of gypsum board" referred to in paragraph 42 of the complaint.

3. State whether or not the allegations of paragraph 54 of the complaint are intended to charge the defendants with the commission of any acts other than the acts referred to

in other paragraphs of the complaint.

4. If the answer to item 3 is in the affirmative, identify

and describe each such act.

5. State, as exactly as possible, the time and place of each of the conferences referred to in paragraph 55 of the

complaint.

6. With respect to the allegation of paragraph 58 of the complaint that Avery, Blagden and Griswold agreed among themselves that efforts should be made to induce the industry to enter into license agreements with U.S.G. having for their purposes long term price stabilization of the board industry:

(a) specify, as exactly as possible, the time or times when and the place or places where Avery, Blagden and Griswold are claimed to have made the agreement or agreements referred to:

(b) specify, as to each such agreement, the person or persons claimed to have represented each of the parties

thereto in the making thereof; and

(c) as to each such agreement state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

7. With respect to the allegation of paragraph 58 of the complaint that Blagden and Griswold agreed to act as a liaison between U.S.G. and the industry for this purpose:

(a) specify, as exactly as possible, the time or times when and the place or places where Blagden and Griswold are claimed to have made the agreement or agreements referred to;

(b) specify, as to each such agreement, the parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(c) as to each such agreement state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

8. With respect to each of the meetings and confer-

ences referred to in paragraph 59 of the complaint:

(a) state, as exactly as possible, the time and

172 place thereof;

(b) identify the representative or representatives of each of the companies present thereat; and

(c) state the substance, as exactly as possible, of what

was said by each of the persons present.

9. With respect to the allegation of paragraph 60 of the complaint that at a meeting in May, 1936, attended by representatives of every company manufacturing and selling board in the Eastern area, including each of the defendant companies then manufacturing board, and by representatives of the defendants Certain-teed and National, which were about to commence the manufacture of board, each of

said companies agreed to become a licensee of U.S.G. under the Utzman patent, and the U.S.G. agreed to license each of the other companies to use said patent, provided a contract with satisfactory provisions concerning royalties and price control could be agreed upon:

(a) state the place of the meeting referred to and iden-

tify the persons present thereat; and

(b) state, as to each of the agreements referred to, whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if partly oral and partly in writing, as to the part in writing furnish a copy thereof or identify the same.

10. With respect to the allegation of paragraph 61 of the complaint that defendant Avery, having obtained an agreement from all board manufacturers in the Eastern

area to become licensees of U.S.G. under the Utzman patent, proposed a contract involving not only the Utzman patent, but 29 other patents and 38 appli-

cations for patents:

(a) specify as exactly as possible the time or times when and the place or places where defendant Avery pro-

posed such a contract;

(b) specify as to each such time the name or names of the persons, firms or corporations to whom such a contract was proposed and the name or names of the person or persons representing such persons, firms or corporations; and

(c) as to each such time, specify whether defendant Avery's proposal was oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part, state the substance thereof, as to the part in writing, furnish a copy thereof or identify the same.

11. With respect to the averment of paragraph 62 of the complaint that the members of the industry considering

licenses objected to this contract:

(a) identify each such member of the industry;

(b) specify, as exactly as possible, the time or times when and the place or places where each such member of

the industry so objected;

(c) specify, as to each such time and member of the industry, the person or persons claimed to have represented such member of the industry and the person or persons to whom the objection was made; and

(d) as to each such time, state whether the objection is claimed to have been oral or in writing;

174 if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part, state the substance thereof, as to the part in writing, furnish a copy thereof, or identify the same.

12. With respect to the allegation of paragraph 62 of the complaint that said companies urged that control of licensee prices by U.S.G. should not cease in 1929:

(a) specify, as exactly as possible, the time or times when and the place or places where each such company so

urged:

(b) specify, as to each such time, the person or persons claimed to have represented each of such companies and

the person or persons who were so urged; and

(c) as to each such time, state whether such companies are claimed to have so urged orally or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part, state the substance thereof, as to the part in writing, furnish a copy thereof or identify the same.

13. With respect to the allegation of paragraph 63 of the complaint that said companies proposed that the license agreements under consideration cover only the Utzman patent and run only until the expiration of said patent:

(a) specify, as exactly as possible, the time or times when and the place or places where each of the proposals

referred to was made;

or names of the person or persons claimed to have represented the company or companies making such proposal and the name or names of the person or persons to

whom it is claimed such proposal was made; and

(c) as to each such proposal, specify whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing, furnish a copy thereof or identify the same.

14. With respect to the allegation of paragraph 63 of the complaint that defendant Avery rejected said counterproposal and insisted upon the contract submitted by him: (a) specify the time or times when and the place or places where defendant Avery rejected said counter-proposal or insisted upon the contract submitted by him; and

(b) as to each such time, specify whether the rejection of the counter-proposal or the insistence upon the contract submitted was oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing, furnish a

copy thereof or identify the same.

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15. State where, when and how Messrs. Griswold and Blagden continued to agitate for the execution of license agreements by the rest of the industry in the Eastern area as alleged in paragraph 65 of the complaint.

16. State the time and the place of each of the meetings and conferences referred to in paragraph 65 of the complaint, and set forth the names of the persons present at each thereof and the substance of what was said thereat.

17. With respect to the allegation of paragraph 69 of the complaint that U.S.G. refused to reduce or to permit its licensees to reduce the basic prices of closed-edge board:

(a) specify, as exactly as possible, the time or times when and the place or places where U.S.G. so refused;

(b) specify, as to each such time, the person or persons claimed to have represented U.S.G., the name or names of the licensee or licensees and the person or persons repre-

senting such licensee or licensees; and

(c) as to each such time, specify whether the refusal is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

18. With respect to the allegation of paragraph 69 of the complaint that U.S.G. agreed to permit its licensees to manufacture and distribute at reduced prices a

177 second-grade closed-edge board:

(a) specify, as exactly as possible, the time or times when and the place or places where U.S.G. is claimed to have made the agreement or agreements referred to:

(b) specify, as to each such agreement, the parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(c) as to each such agreement state whether it is claimed to have been oral or in writing; if in writing, set

forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

19. With respect to the allegation of paragraph 70 of the complaint that U.S.G. refused to modify the royalty

provisions of its license agreement with Beaver:

(a) specify, as exactly as possible, the time or times when and the place or places where U.S.G. so refused;

(b) specify, as to each such time, the person or persons claimed to have represented U.S.G. and the person or

persons claimed to have represented Beaver; and

(c) as to each such time, state whether the refusal of U.S.G. to modify the royalty provisions was oral or in writing and complete convergence.

ing; if in writing, set forth a true and complete copy
thereof or identify the same; or, if oral state the
substance thereof; or, if partly oral and partly in
writing, as to the oral part state the substance thereof, as
to the part in writing furnish a copy thereof or identify
the same.

20. With respect to the allegation of paragraph 73 of the complaint that, to meet the competition of the second-grade closed-edge board, manufacturers of open-edge board reduced the prices of said board, identify each such manufacturer and in respect of each such manufacturer specify the time or times when the price of such board was so reduced and set forth the amount of each reduction.

21. With respect to the allegation of paragraph 73 of the complaint that manufacturers of second-grade closededge board, in turn, reduced the prices of said board, identify each such manufacturer and in respect of each such manufacturer specify the time or times when the price of such board was reduced and set forth the amount of each

reduction.

22. Specify the other gypsum products the prices of which were substantially reduced as alleged in the last sentence of paragraph 73 of the complaint and in respect of each of such products specify the time or times when the price thereof was reduced and set forth the amount of each reduction.

23. With respect to the allegation of paragraph 74 of the complaint that defendant Avery urged that those companies in the industry not yet licensees of U.S.G. reconsider his proposal for an industry-wide patent licensing

plan covering board with price control by U.S.G.

(a) specify, as exactly as possible, the time or times when and the place or places where said defendant is claimed to have so urged such companies;

(b) specify, as to each such time, the person or persons representing such companies claimed to have been

so urged; and

(c) as to each such time, state whether said defendant is claimed to have urged such companies orally or in writing; if in writing, set forth a true and complete copythereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

24. With respect to the allegation of paragraph 74 of the complaint that Eugene Holland, then President of Universal, agreed with Avery to promote the licensing plan:

(a) specify the time when and the place where it is claimed that said Holland made the agreement or agree-

ments referred to; and

(b) as to each such agreement, state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

25. Specify, as exactly as possible, the date and place of each of the meetings and conferences referred to in the last two sentences of paragraph 74 of the complaint, setting forth the names of the persons present at each such

meeting or conference and the substance of what was said at each such meeting or conference by each

person present thereat.

26. With respect to the allegation of paragraph 75 of the complaint that U.S.G., through Avery, assured representatives of the other companies that, if said agreements were executed, U.S.G. would then take steps to control the prices of its licensees throughout the life of the license under color of some patent:

(a) state, as exactly as possible, the time or times when and the place or places where U.S.G. so assured such

representatives;

(b) state, as to each such time, the name or names of

the representatives referred to; and

(c) as to each such time, state whether U.S.G. is claimed to have so assured such representatives orally or in writing; if in writing, set forth a true and complete

copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

27. With respect to the agreement or agreements referred to in the allegation contained in the last sentence of paragraph 75 of the complaint that National, Certainteed, Ebsary and Niagara agreed among themselves and with U.S.G. to become licensees of U.S.G.

(a) specify, as exactly as possible, the time or times when, and the place or places where, each such agreement

is claimed to have been made;

(b) specify as to each such agreement the parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(c) as to each such agreement, state whether it was oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the ofal part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

28. With respect to each of the meetings and conferences referred to in paragraph 76 of the complaint:

(a) state, as exactly as possible, the time and place

therest;

(b) identify the representative or representatives of U.S.G., its licensees, Certain-teed, National, Ebsary and Niagara, respectively, present thereat; and

(c) state, as exactly as possible, the substance of

what was said by each of such persons.

29 With respect to the agreement or agreements referred to in the allegation of paragraph 77 of the complaint that U.S.G. and its licensees mutually agreed among themselves as alleged in said paragraph:

(a) specify, as exactly as possible, the time or times when, and the place or places where, each such agreement

is claimed to have been made:

(b) as to each such agreement, specify the parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(c) as to each such agreement, state whether it was oral of in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral,

state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify

the same.

30. With respect to the allegation of paragraph 78 of the complaint that immediately after the execution of the May agreements, U.S.G. offered to enter into additional license agreements with its licensees, permitting them to use a new process developed by U.S.G. for lightening the weight of the board:

(a) specify, as exactly as possible, the time or times when, and the place or places where, U.S.G. is claimed to

have offered to enter in such agreements;

(b) as to each such time, specify the persons claimed to have represented U.S.G. and the person or persons to

whom the offer was made; and

(c) as to each such offer, state whether it was oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the

oral part state the substance thereof, as to the part 183 in writing furnish a copy thereof or identify the

31. With respect to the allegation of paragraph 79 of the complaint that, to obtain said stability and pliability in the bubbles, U.S.G. contemplated, at the time of its offer of the foam process to its licensees the use of several methods:

(a) specify the name or names of the person or persons who, on behalf of U.S.G., contemplated the use of

several methods: and

(b) specify and describe each of the methods re-

ferred to.

32. With respect to the allegation of paragraph 81 of the complaint that Universal asserted that the use of farinaceous paste in the foam process infringed said

patents:

(a) specify, as exactly as possible, the time or times when and the place or places where Universal made the assertion or assertions that the use of farinaceous paste in the foam process infringed the patents referred to in said paragraph;

(b) specify, as to each such assertion, the person or persons claimed to have represented Universal and the person or persons to whom the assertion was made; and

(c) as to each such assertion, state whether it is claimed to have been oral or in writing; if in writing, set

forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if

partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing

furnish a copy thereof or identify the same.

33. With respect to the allegation of paragraph 82 of the complaint that the contemplated use of farinaceous paste in the foam process to reinforce the walls of the bubbles did not, in fact, as U.S.G. well knew, infringe the Hite and Haggerty patents, specify the name or names of the person or persons representing U.S.G. who are claimed to have

known that such use did not infringe said patents.

34. With respect to the allegation of paragraph 82 of the complaint that other practicable and equally efficient methods for lending stability and pliability to the bubbles, not infringing the starch patents, were known to U.S.G. at the time of Universal's assertion, specify the name or names of the person or persons representing U.S.G. who are claimed to have known of such alleged other practicable and equally efficient methods.

35. Identify and describe the other practicable and equally efficient methods for lending stability and pliability to the bubbles referred to in paragraph 82 of the complaint.

36. With respect to the allegation of paragraph 82 of the complaint that U.S.G. advised its licensees that the Hite and Haggerty patents were of doubtful validity and that the foam process did not infringe said patents:

(a) specify, as exactly as possible, the time or times when and the place or places where it is claimed that U.S.G.

so advised its licensees;

(b) specify, as to each such time, the person or persons claimed to have represented U.S.G. in so advising its licensees, the name or names of the licensee or licensees who were so advised and the name or names of the person or persons claimed to have represented such licensee or licensees; and

(c) as to each such time, state whether the advice of U.S.G. is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or if oral state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

37. With respect to the allegations of paragraph 83 of the complaint that U.S.G. agreed to purchase the Hite and Haggerty patents from Universal provided its licensees

would accept licenses covering said patents and the foam process:

(a) specify, as exactly as possible, the time or times when and the place or places where each agreement re-

ferred to is claimed to have been made;

(b) specify, as to each such agreement, the parties thereto and the person or persons claimed to have repre-sented each of such parties in the making thereof; and

(c) as to each such agreement, state whether it is claimed to have been oral or in writing; if in writing, .186 set forth a true and complete copy thereof or identify

the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

38. With respect to the allegations of paragraph 83 of the complaint that each of the licensees agreed with U.S.G. and among themselves to accept said license and that U.S.G. agreed to acquire, and did acquire, the starch patents from

(a) specify, as exactly as possible, the time or times when and the place or places where each agreement referred

to is claimed to have been made;

(b) specify, as to each such agreement, the parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(c) as to each such agreement, state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

39. With respect to the allegations of paragraph 84 of the complaint that U.S.G. agreed to acquire said starch patents, and U.S.G. and its licensees agreed to execute, and

did execute, license agreements covering said patents for the purpose of giving color of legality to price control by U.S.G. of board manufactured by its licensees during the period between the date of expiration of the Utzman patent and the date of issuance of patents

on the foam process:

(a) specify, as exactly as possible, the time or times when and the place or places where each agreement (other

than license agreements) referred to is claimed to have been made:

(b) specify, as to each such agreement, the parties thereto and the person or persons claimed to have repre-

sented each of such parties in the making thereof; and

(c) as to each such agreement, state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy

thereof or identify the same.

40. With respect to the allegations of paragraph 86 of the complaint that each of the licensees mutually agreed among themselves and with U.S.G. as alleged in said paragraph; that each of the licensees referred to therein agreed to consider the use of adhesives as falling within the scope of the Hite and Haggerty patents for the purpose of permitting price control by U.S.G. during the life of said patents; that Ebsary and Kelley Plasterboard agreed to commence using adhesives for the same purpose, and that the licensees

agreed to use the foam process in the manu-188 facture of gypsum board as soon as their plants could be equipped, and agreed to manufacture and distribute a closed-edge board, manufactured and bundled by substantially the same processes as those employed by

U.S.G.:

(a) specify, as exactly as possible, the time or times when, and the place or places where, each of the agreements referred to is claimed to have been made;

(b) specify, as to each such agreement, the parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(c) as to each such agreement, state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

41. Specify the agreements referred to in the first sentence of paragraph 87 as "the aforesaid agreements".

42. With respect to the threats referred to in para-

graph 88 of the complaint:

la) specify the time or times when and the place or places where each such threat is claimed to have been made:

(b) specify the person or persons through whom U.S.G. is claimed to have made each such threat and the person or persons representing Texas to whom

such threat is claimed to have been made; and

(c) as to each such threat, state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if the same is claimed to have been partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

43. Identify and describe each act, means and instrumentality whereby it is claimed, as alleged in paragraph 90 of the complaint, that U.S.G. determined and fixed the selling prices and terms and conditions of sale of its licensees for all gypsum board manufactured by said licensees.

44. Identify and describe each act, means and instrumentality whereby it is claimed that the defendant companies have, by concerted action, sought to standardize the production of gypsum board as alleged in paragraph 93 of the complaint.

45. Describe the agreed-upon scope of each of the patents referred to in the first sentence of paragraph 93

of the complaint.

46. With respect to the allegations of paragraph 93 of the complaint that defendant National during the years 1934 and 1935 was induced by U.S.G. and its other licensees to refrain from marketing a new light-weight board until the other licensees were equipped to manufacture and

market a board of similar weight:

or places where defendant National was so induced by U.S.G. and the other licensees:

(b) specify, as to each such time, the person or persons claimed to have represented U.S.G., the person or persons claimed to have represented each of its licensees and the person or persons claimed to have represented National; and

(c) as to each such time, state whether defendant National is claimed to have been so induced orally or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or; if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing, furnish a copy thereof or identify the same.

47. With respect to the allegation of paragraph 94 of the complaint that, pursuant to said agreement, U.S.G., during the period from 1929 to 1932, permitted its licensees,

including the defendant companies who were then licensees, to sell only to jobbers who sold to dealers and who maintained bulletin prices in said sales, identify and describe each act, means and instrumentality whereby it is claimed that U.S.G. so permitted its licensees to sell only to such jobbers.

48. With respect to each of the meetings referred to in the first sentence of paragraph 95 of the complaint, specify the time and place thereof and the person or persons present thereat representing U.S.G. and each of the licen-

sees, respectively, and state the substance of

191 what was said by each of such persons.

49. With respect to the allegations of paragraph 95 of the complaint that U.S.G. and the licensees agreed among themselves to sell gypsum board to jobbers at no less than the minimum prices set by U.S.G. for sales of board to dealers and to sell plaster and miscellaneous products to jobbers at no less than the prevailing market prices to dealers for said gypsum products:

(a) specify, as exactly as possible, the time or times when and the place or places where each of the agreements

referred to is claimed to have been made; .

(b) specify, as to each such agreement, the parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(c) as to each such agreement, state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

50. Specify the agreement referred to in the first sentence of paragraph 97 of the complaint as "the aforesaid

agreement among U.S.G. and its licensees".

51. Identify and describe each act, means and instrumentality whereby it is claimed, as alleged in paragraph 97 of the complaint, that U.S.G. during the period from

May, 1929, to November, 1929, determined and fixed the prices, for unpatented open-edge board and

each act, means and instrumentality whereby it is claimed that during the period between August and November, 1929, U.S.G. determined and fixed the prices for closed-edge board.

52. With respect to the allegation of paragraph 100 of the complaint that all of the licensees, except Universal, used adhesives which were beyond the scope of the Haggerty

patent, specify the adhesive or adhesives beyond the scope of said patent which are claimed to have been used by

each of such licensees.

53. With respect to the allegation of paragraph 101 of the complaint that during the period from October, 1935, to the date of the filing of the complaint, a substantial part of the board produced by various of the licensees has not been covered by the aforesaid patents issued upon the foam process:

(a) specify which licensees have, during such period,

produced board not covered by such patents; and

(b) in respect of each such licensee, state as exactly as possible the time or times when, and the place or places where, such board has been produced during such period and in respect of each such time, describe the board so produced and set forth as exactly as possible an estimate of the amount thereof.

54. Identify and describe each act, means and instrumentality whereby it is claimed that U.S.G. and its licensees concertedly raised and stabilized the prices of plaster and

miscellaneous gypsum products as alleged in

193 paragraph 103 of the complaint.

55. With respect to the allegation of paragraph 103 of the complaint that from time to time throughout the period from the year 1929 to the date of the filing of the complaint, U.S.G. and its licensees had agreed among themselves to sell plaster and miscellaneous gypsum contracts on the basis of various of the terms and conditions prescribed by U.S.G. for the sale of gypsum board:

(a) specify, as exactly as possible, the time or times when and the place or places where each of the agreements

referred to is claimed to have been made;

(b) specify, as to each such agreement, the parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(c) as to each such agreement, state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

56. Specify the terms and conditions on the basis of which it is claimed that from the year 1929 to the date of the filing of the complaint U.S.G. and its licensees have agreed among themselves to sell, and have sold, plaster

and miscellaneous gypsum products as alleged in paragraph

103 of the complaint.

194 57. Identify and describe each act; means and instrumentality whereby it is claimed that U.S.G. and its licensees, as alleged in paragraph 104 of the complaint, have concertedly refrained from selling plaster and miscellaneous gypsum products in mixed cars or trucks with gypsum board at prices below the prevailing market prices for said plaster and miscellaneous gypsum products.

58. With respect to the allegation of paragraph 107 of the complaint that in the year 1936 U.S.G. and its licensees agreed among themselves to file all protected job contracts covering plaster and miscellaneous gypsum contracts with an agency selected by a gypsum trade associa-

tion known as the Gypsum Statistical Institute:

(a) specify, as exactly as possible, the time or times when and the place or places where each of the agreements referred to it claimed to have been made;

(b) specify, as to each such agreement, the parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(c) as to each such agreement, state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

59. Identify and describe each act, means and instrumentality whereby it is claimed that U.S.G.

and its licensees, as alleged in paragraph 108 of the complaint, have, by concerted action, induced and coerced manufacturing distributors purchasing gypsum board from U.S.G. and its licensees to resell said gypsum board to dealers and consumers at the bulletin prices determined and fixed by U.S.G. for sales of board by its licensees.

60. With respect to the allegation contained in paragraph 109 of the complaint that U.S.G., as a condition for the consent of U.S.G. to sales by the licensees of gypsum board to manufacturing distributors, has required that manufacturing distributors maintain and adhere to bulletin prices in reselling gypsum board to dealers and consumers:

(a) specify, as exactly as possible, the time or times when, the place or places where, and the names of the persons, firms or corporations of whom it is claimed that U.S.G. exacted such a condition;

(b) specify, as to each such time, the name or names of person or persons claimed to have represented U.S.G. and the name or names of the person or persons claimed to have represented such persons, firms or corporations;

(c) as to each such time, specify whether the condition is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy

thereof or identify the same;

196 (d) state whether it is claimed that there were any agreements between U.S.G. and the manufacturers, or any of them, or between U.S.G. and the distributors, or any of them, whereby the manufacturers, or any of them, were to require any of the distributors, or whereby the distributors were required to maintain and adhere to U.S.G. dealer prices in reselling gypsum board to dealers and consumers; and

(e) if it is claimed that there were any such agree-

ments:

(i) specify, as exactly as possible, the time or times when and the place or places where each such agreement was made:

(ii) specify, as to each such agreement, the parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(iii) as to each such agreement, state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

61. With respect to the allegation of paragraph 109 of the complaint that U.S.G. and its licensees have agreed among themselves to sell gypsum board to manufacturing

distributors only on condition that the distributors

197 maintain, and adhere to, bulletin prices:

(a) specify, as exactly as possible, the time or times when and the place or places where each of the agreements referred to is claimed to have been made;

(b) specify, as to each such agreement, the parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(c) as to each such agreement, state whether it is claimed to have been oral or in writing; if in writing, set

forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

62. With respect to the allegations of paragraph 110

62. With respect to the allegations of paragraph 110 of the complaint that manufacturing distributors have agreed to resell gypsum board to dealers and consumers

at bulletin prices:

(a) specify, as exactly as possible, the time or times when and the place or places where each of the agreements

referred to is claimed to have been made;

(b) specify, as to each such agreement, the parties thereto and the person or persons claimed to have represented each of such parties in the making thereof; and

(c) as to each such agreement, state whether

198 it is claimed to have been oral or in writing; if in
writing, set forth a true and complete copy thereof
or identify the same; or, if oral state the substance thereof;
or, if partly oral and partly in writing, as to the oral part
state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

63. With respect to the allegation contained in paragraph 111 of the complaint that U.S.G. and its licensees have from time to time advised manufacturing distributors

of bulletin prices:

(a) specify, as exactly as possible, the time or times when and the place or places where U.S.G. and its licensees are claimed to have advised manufacturing distributors of

such prices;

(b) specify, as to each such time, the name or names of the licensee or licensees claimed to have advised one or more manufacturing distributors of such prices, the name or names of the person or persons representing U.S.G., and/or each such licensee, the name of each manufacturing distributor who was so advised and the name or names of the person or persons representing such manufacturing distributor; and

(c) specify, as to each such time, whether the advice is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the

substance thereof, as to the part in writing furnish

199 a copy thereof or identify the same.

64. With respect to the allegation of paragraph 111 of the complaint that U.S.G. and its licensees have investigated and policed sales of gypsum board by manufacturers and distributors:

(a) specify what is meant by the word "policed" and whether it is intended to use such word synonymously with

the word "investigated";

(b) identify and describe each act, means and instrumentality by which it is claimed that U.S.G. and its licensees have so investigated such sales of gypsum board; and

(c) identify and describe each act, means and instru-mentality by which it is claimed that U.S.G. and its licen-

sees have policed such sales of gypsum board.

65. With respect to the allegations of paragraph 113 of the complaint that each of the licensees agreed among themselves and with U.S.G. to become licensees of U.S.G.

(a) specify, as exactly as possible, the time or times when and the place or places where each of the agreements referred to is claimed to have been made;

(b) specify, as to each such agreement, the parties thereto and the person or persons representing each of such parties in the making thereof; and

(c) as to each such agreement, state whether it is claimed to have been oral or in writing; if in writing,

set forth a true and complete copy thereof 200 or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

66. With respect to the allegation of paragraph 114 of the complaint that U.S.G. required its licensees to execute said agreements in order to be enabled to purchase metalized

board for resale to dealers and consumers:

(a) specify, as exactly as possible, the time or times when, the place or places where, and the name or names of the licensee or licensees upon whom U.S.G. imposed such a requirement:

(b) specify, as to each such time, the name or names of the person or persons claimed to have represented U.S.G. and the name or names of the person or persons claimed to

have represented each of the licensees; and

(c) specify, as to each such time, whether the requirement was imposed orally or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

67. With respect to the allegations of paragraph 116 of the complaint that U.S.G. agreed to fix the price of perforated lath at a differential above the price of straight lath:

201 (a) specify, as exactly as possible, the time or times when and the place or places where each of the agreements referred to is claimed to have been made:

(b) specify, as to each such agreement, the parties thereto and the person or persons representing each of

such parties in the making thereof; and

(c) as to each such agreement, state whether it is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same; or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

68. State whether it is intended by the use of the expression "all of the licensees of U.S.G." in the last sentence of paragraph 118 of the complaint to refer to the licensees named in paragraph 89 of the complaint or whether it is intended by the use of such expression to refer to the licensees of the licenses to manufacture perforated lath referred

to in the first sentence of said paragraph 118.

69. With respect to the allegation of paragraph 119 of the complaint that U.S.G., Certain-teed and American were informed that the patent referred to therein was void and did not embrace in any of the specifications or claims thereof any patentable invention or discovery within the meaning of the patent laws of the United States:

(a) specify, as exactly as possible, the time or times when and the place or places where U.S.G.,

Certain-teed and American were so informed;

(b) as to each such time, specify the person or persons representing the U.S.G., Certain-teed and American, respectively, who were so informed and the person or

persons who so informed each of such persons; and

(c) as to each such time, state whether the information is claimed to have been oral or in writing; if in writing, set forth a true and complete copy thereof or identify the same: or, if oral, state the substance thereof; or, if partly oral and partly in writing, as to the oral part state the substance thereof, as to the part in writing furnish a copy thereof or identify the same.

70. With respect to the allegation of paragraph 119 of the complaint that U.S.G., Certain-teed and American believed that the patent was void and did not embrace in

any of the specifications or claims thereof any patentable invention or discovery within the meaning of the patent laws of the United States, specify the name or names of the persons or persons representing U.S.G., Certain-teed and American, respectively, who so believed and the period of

time during which each such person so believed.

71. With respect to the allegations of paragraph 121 of the complaint that the defendants have standardized the manufacture of board, have limited the distribution of board to themselves and to certain manufacturing distributors, and have completely eliminated from the distributive system wholesale distributors who might fail to main-

tain said prices, specify whether such allegations, or any of them, are intended to charge the

defendants with the commission of any acts other than acts with the commission of which the defendants are charged in other paragraphs of the complaint, and if the answer to this question is in the affirmative, identify and

describe each such act.

72. With respect to the allegations of paragraph 123 of the complaint that the uniformity among the defendant companies in the distribution of gypsum board has reflected itself in the uniformity among said companies in the distribution of plaster and miscellaneous gypsum products, specify whether such allegations are intended to charge the defendants with the commission of any acts other than acts with the commission of which the defendants are charged in other paragraphs of the complaint, and if the answer to this question is in the affirmative, identify and describe each such act.

73. Specify the terms and conditions of sale prescribed by U.S.G. for the sale of gypsum board on the basis of which, it is claimed, as alleged in paragraph 123 of the complaint, that the defendant companies now distribute

plaster and miscellaneous gypsum products.

AND directing that as to such paragraphs of this motion or of any items thereof as to which plaintiff shall state in its more definite statement or bill of particulars that it has no knowledge or information or incomplete knowledge or information, plaintiff furnish the defendants in its more definite statement or bill of particulars whatever knowledge or information it may have, and furnish further par-

ticulars within sixty (60) days after it has obtained further knowledge or information and, in any event, not later than thirty (30) days before the

trial of this action.

For an order, pursuant to Rule 6(b) of said Rules, extending the time of the defendants within which to answer the complaint herein until sixty (60) days after service upon the attorneys for the defendants of a copy of the more definite statement or bill of particulars directed to be furnished by the order to be entered upon this motion, or in the event that this motion for a more definite statement or a bill of particulars be denied in all respects, until sixty (60) days after service upon the attorneys for the defendants of a copy of the order denying such motion, with notice of entry thereof.

III

For an order granting the defendants such other and further relief as may be deemed just and proper in the premises.

Dated, November 18, 1940.

RICHARD H. WILMER, DOUGLAS L. HATCH.

Attorneys for defendants United States Gypsum Company, Sewell L. Avery, and Oliver M. Knode, 616 Transportation Bldg., Wash., D. C.

FREDERICK A. BALLARD,

Attorney for defendants National Gypsum Company and Melvin H. Baker, American Security Bldg., Wash., D. C.

O. MAX GARDNER,

HAROLD F. MCGUIRE,

Attorneys for defendants Certain-teed Products Corporation and Henry J. Hartley, Woodward Bldg., Wash., D. C.

WALTER G. MOYLE,

Attorney for defendants The Celotex Corporation and Bror H. Dahlberg, Earle Bldg., Wash., D. C.

JOSEPH P. TUMULTY, Attorney for defendants Ebsary Gypsum Company, Inc., and

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Frederick G. Ebsary, 1317 F St., W., Wash., D. C.

Attorney for defendant Newark Plaster Company and Frederick Tomkins, 1331 G St., N. W., Wash., D. C.

DAVID I. JOHNSTON, GEO. E. H. GOODNER.

Attorneys for defendant Samuel M. Gloyd, Munsey Bldg., Wash., D. C.

206 In the District Court of the United States for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Order-Filed May 12, 1941

This matter having come on to be heard on April 23, 1941, on motion of the defendants for an order, pursuant to Rule 12(e) of the Rules of Civil Procedure for the District Courts of the United States, directing plaintiff to furnish a more definite statement or a bill of particulars, and the Court having heard the arguments of Bruce Bromley, Esq., of counsel for defendants of United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, in support of said motion, and of Grant W. Kelleher, Esq., Special Assistant to the Attorney General, and of Edward J. Hickey, Jr., in opposition thereto, and having considered the arguments of counsel and briefs submitted on behalf of the plaintiff and on behalf of the defendants, it is, this 12th day of May, 1941,

Ordered that plaintiff on or before thirty (30) days from the date hereof serve upon the attorneys for the respective defendants and file in the office of the Clerk of this Court a more definite statement or bill of particulars of matters

embraced within the complaint as follows:

First: Specify the miscellaneous gypsum products referred to in paragraph 40, in the first sentence of paragraph 44, in paragraph 45(c) and (d), in the second and

7 last sentence of paragraph 95, in paragraphs 103, 104, 106, 107, 121 and 123, respectively, of the com-

plaint.

Second: Identify the "various small manufacturers of calcined gypsum and plaster not engaged in the manufac-

ture of gypsum board" referred to in paragraph 42 of the

complaint.

Third: State whether or not the allegations of paragraph 54 of the complaint are intended to charge the defendants with the commission of any acts other than the acts referred to in other paragraphs of the complaint and if the allegations are so intended, identify and describe each such act.

Fourth: Specify the other gypsum products the prices of which were substantially reduced as alleged in the last sentence of paragraph 73 of the complaint and in respect of each of such products specify the time or times when the price thereof was reduced and set forth the amount of each reduction.

Fifth: Specify the agreements referred to in the first sentence of paragraph 87 as "the aforesaid agreements".

Sixth: Describe the agreed-upon scope of each of the patents referred to in the first sentence of paragraph 93 of the complaint.

Seventh: Specify the agreement referred to in the first sentence of paragraph 97 of the complaint as "the afore-

said agreement among U.S.G. and its licensees".

Eighth: Specify the terms and conditions on the basis of which it is claimed that from the year 1929 to the date of the filing of the complaint U.S.G. and its licensees have agreed among themselves to sell, and have sold,

208 plaster and miscellaneous gypsum products as al-

leged in paragraph 103 of the complaint.

Ninth: With respect to the allegation of paragraph 111 of the complaint that U.S.G. and its licensees have investigated and policed sales of gypsum board by manufacturers and distributors:

(a) specify what is meant by the word "policed" and whether it is intended to use such word synonymously with

the word "investigated".

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Tenth: State whether it is intended by the use of the expression "all of the licensees of U.S.G." in the last sentence of paragraph 118 of the complaint to refer to the licensees named in paragraph 89 of the complaint or whether it is intended by the use of such expression to refer to the licensees of the licenses to manufacture perforated lath referred to in the first sentence of said paragraph 118.

Eleventh: With respect to the allegations of paragraph 121 of the complaint that the defendants have standardized

the manufacture of board, have limited the distribution of board to themselves and to certain manufacturing distributors, and have completely eliminated from the distributive

tors, and have completely eliminated from the distributive system wholesale distributors who might fail to 209 maintain said prices, specify whether such allegations, or any of them, are intended to charge the defendants with the commission of any acts other than acts with the commission of which the defendants are charged in other paragraphs of the complaint, and if the answer to this question is in the affirmative, identify and

describe each such act.

Twelfth: With respect to the allegations of paragraph 123 of the complaint that the uniformity among the defendant companies in the distribution of gypsum board has reflected itself in the uniformity among said companies in the distribution of plaster and miscellaneous gypsum products, specify whether such allegations are intended to charge the defendants with the commission of any acts other than acts with the commission of which the defendants are charged in other paragraphs of the complaint, and if the answer to this question is in the affirmative, identify and describe each such act; and it is

Further ordered that the time of the defendants within which to answer the complaint herein be, and the same hereby is, extended until sixty (60) days after service upon the attorneys for the defendants of a copy of the more definite statement or bill of particulars herein directed to

be furnished and it is

Further ordered that said motion of the defendants be, and the same hereby is, in all other respects denied.

DANIEL W. O'DONOGHUE,

Justice.

May 12, 1941.

210 In the District Court of the United States for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Bill of Particulars Filed May 15, 1941

Comes now the United States of America, by its attorneys, and files the following bill of particulars in compliance with the order of the Court filed herein the 12th day of May, 1941, granting certain of the requests for particulars contained in defendants' motion for a bill of particulars filed November 18, 1940:

In compliance with the first paragraph of said order: The term "miscellaneous gypsum products" appearing in Paragraph 40, in the first sentence of Paragraph 44, in Paragraphs 45 (c) and (d), in the second and last sentences of Paragraph 95 and in Paragraphs 103, 104, 106, 107, 121 and 123, respectively, of the complaint, means and includes gypsum block, gypsum tile and Keene's cement.

### II

In compliance with the second paragraph of said order:
The "various small manufacturers of calcined gypsum and plaster not engaged in the manufacture of gypsum board" referred to in Paragraph 42 of the complaint refers to the following companies:

Structural Gypsum Corporation, Linden, N. J.

American Cyanamid & Chemical Corporation, New
York, N. Y.

Connecticut Adamant Plaster Company, New Haven,

Oakfield Gypsum Products Corporation, Oakfield, N. Y. The Calvin Tomkins Company, New York, N. Y. Grand Rapids Plaster Company, Grand Rapids, Mich. Michigan Gypsum Company, Grand Rapids, Mich. The Alabastine Company, Grand Rapids, Mich. Wasem Plaster Company, Fort Dodge, Iowa.

## III

In compliance with the third paragraph of said order: The allegations of Paragraph 54 of the complaint are not intended to charge the defendants with the commission of any acts other than the acts referred to in subsequent paragraphs of the complaint.

### IV

In compliance with the fourth paragraph of said order: The term "other gypsum products" appearing in the last sentence of Paragraph 73 of the complaint means and includes gypsum plaster, gypsum tile, gypsum block, and Keene's cement. Reductions in the prices of said products were made by all manufacturers on numerous occasions during the year 1928. The exact time and the exact amount of each price reduction by each manufacturer is unknown to the Government.

In compliance with the fifth paragraph of said order: The agreements referred to in the first sentence of Paragraph 87 of the complaint as "the aforesaid agreements" are the agreements alleged in Paragraphs 85 and 86 of the complaint.

In compliance with the sixth paragraph of said order: The words "agreed-upon scope of patents involved in the license agreements" as used in Paragraph 93 of the complaint have reference to the allegations contained in Paragraph 86 (a) of the complaint, to the effect that each of the licensees agreed to consider the use of adhesives in the manufacture of board to increase adhesion between the core and liners as falling within the scope of the Hite and Haggerty patents for the purpose of permitting price control by U. S. G. during the life of said patents.

In compliance with the seventh paragraph of said order: The term "the aforesaid agreement among U. S. G. and its licensees" appearing in the first sentence of Paragraph 97 of the complaint refers to the agreement described in Paragraph 77 (a) of said complaint.

In compliance with the eighth paragraph of said order: The Government claims that pursuant to the agreements referred to in Paragraph 103 of the complaint, U. S. G. and its licensees have adopted and utilized for sales of plaster and miscellaneous gypsum products the basing points, the delivered price zones for rail delivery, the delivered price zones for truck delivery, the areas in which dealers may make pick-up purchases at mills or warehouses, and the maximum cash discounts and terms of sale specified by U. S. G. for sales of gypsum board; and that, pursuant to said agreements, U. S. G. and its licensees, in making sales of plaster and gypsum products, have eliminated deliveries to job sites, sales direct to builders or contractors (with certain exceptions), sales to the United States Government at prices other than dealer prices except in the cases of projects to which sales of gypsum board may be made at special prices, sales through commission salesmen, brokers, and commission houses, payments for the use of buyers' trucks and payments or allowances to dealers for unloading, storing, and trucking by

dealers, and warehousing allowances, and other forms of allowances or payments to dealers for services

rendered by the dealers to the licensees; and that pursuant to said agreements, U.S.G. and its licensees have adopted a policy of fixed price differentials to various classes of customers and elimination of discounts to certain classes of buyers, including mail order houses and jobbers, which said policy has been applied to sales of plaster and miscellaneous gypsum products as well as to sales to gypsum board.

In compliance with the ninth paragraph of said order: The word "policed" as used in Paragraph 111 of the complaint is employed in its usual connotation and its commonly accepted sense, to wit: Governed; maintained order in; placed under the control of a police system; guarded; watched over.

The word "policed" is not intended to be used synony-mously with the word "investigated".

In compliance with the tenth paragraph of said order: The phrase "all of the licensees of U.S. G." appearing in the last sentence of Paragraph 118 of the complaint, refers to the licensees of U.S.G. under the perforated lath patent, as set forth in Paragraph 117 of said complaint.

In compliance with the eleventh paragraph of said order: The allegations of Paragraph 121 of the complaint that "the defendants have standardized the manufacture of board, have limited the distribution of board to themselves and to certain manufacturing distributors, and have

completely eliminated from the distributive system wholesale distributors who might fail to maintain said prices," are not intended to charge the defendants with any acts in addition to the acts with the commission of which the defendants are charged in other paragraphs of the complaint,

In compliance with the twelfth paragraph of said order: The allegations of Paragraph 123 of the complaint that "the uniformity among the defendant companies in the distribution of gypsum board has reflected itself in uniformity among said companies in the distribution of plaster and miscellaneous gypsum products" are not intended to charge the defendants with the commission of any acts

other than acts with the commission of which the defendants are charged in other paragraphs of the complaint.

Grant W. Kelleher,
GRANT W. KELLEHER,
Special Assistant to the Attorney General.
Geo. B. Haddock,
GRONGE B. HADDOCK

GEORGE B. HADDOCK,

Special Attorney.

Receipt of a copy of this bill of particulars is hereby acknowledged this 15th day of May, 1941.

Douglas D. Hatch, Counsel for Defendants.

215 In the District Court of the United States for The District of Columbia

[Title omitted.]
[File endorsement omitted.]

Amendment to Complaint Filed June 5, 1941

Whereas the complaint herein was filed on the 15th of August, 1940, and no responsive pleading thereto has been filed or served, the United States of America, by its attorneys, acting pursuant to the provisions of Rule 15 (a) of the Rules of Civil Procedure for the District Courts of the United States, hereby amends said complaint as follows:

1. Strike the third and fourth sentences of Paragraph 20 of the complaint, and substitute in lieu thereof the

following:

"Said sales area will be referred to hereinafter as the Eastern area, and includes the District of Columbia and the States of Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska,

New Hampshire, New Jersey, New Mexico, New 216 York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, West Virginia, Wisconsin, Wyoming, and that portion of the State of Montana east of the counties of Phillips, Petroleum, Musselshell, Yellowstone and Carbon. The defendant companies manufacture and sell 100% of all gypsum board sold in the Eastern area, and 80% of all gypsum plaster sold in the Eastern area."

2. Strike the second sentence of Paragraph 31 of the

complaint and substitute in lieu thereof the following:

"From that date to the present, it has been the largest producer of gypsum board and plaster in the United States. In 1939 it produced and sold approximately 55% of all gypsum board and approximately 40% of all plaster sold in the Eastern area. In said year, the sales by U.S.G. in the Eastern area of gypsum board manufactured by it amounted to approximately \$10,600,000."

3. Strike the first sentence of Paragraph 33 of the com-

plaint and substitute in lieu thereof the following:

"National is the second largest producer of gypsum products in the United States. In 1939 it produced and sold approximately 23% of all gypsum board and over 20% of all plaster sold in the Eastern area. In said year, the sales by National in the Eastern area of gypsum board manufactured by it amounted to approximately \$4,500,000.

4. Strike the second sentence of Paragraph 35 of the

complaint and substitute in lieu thereof the follow-

ing

In 1939 it produced and sold approximately 11% 217 of all gypsum board and approximately 10% of all plaster sold in the Eastern area. In said year, the sales by Certain-teed in the Eastern area of gypsum board manufactured by it amounted to approximately \$2,100,000."

5. Strike Paragraph 36 of the complaint and substitute

in lieu thereof the following:

"The defendants Celotex, Ebsary, Newark, and Texas are single plant operators and, together, in 1939 produced and sold approximately 11% of the gypsum board and 10% of the plaster sold in the Eastern area. In 1939, sales by Celotex in the Eastern area of gypsum board manufactured by it amounted to approximately \$585,000; sales by Ebsary in the Eastern area of gypsum board manufactured by it amounted to approximately \$670,000; sales by Newark in the Eastern area of gypsum board manufactured by it amounted to approximately \$750,000; and sales by Texas in the Eastern area of gypsum board manufactured by it amounted to approximately \$230,000."

6. Strike Paragraph 87 of the complaint and substitute in

lieu thereof the following:

"In 1930, U.S.G., National, Certain-teed, Universal, Atlantic, Ebsary, American, Kelley Plasterboard, and Texas manufactured and sold 100% of the gypsum board sold in the Eastern area. In said year, sales by U.S.G. in the Eastern area of gypsum board manufactured by it amounted to approximately \$8,530,000; sales by National in the East-

ern area of gypsum board manufactured by it amounted to approximately \$1,720,000; sales by Certain-teed in the Eastern area of gypsum board manufactured by it amounted to approximately \$1,380,000; sales by Universal in the Eastern area of gypsum board manufactured by it amounted to approximately \$690,000; sales by Atlantic in the Eastern area of gypsum board manufactured by it amounted to approximately \$356,000; sales by Ebsary in the Eastern area of gypsum board manufactured by it amounted to approximately \$210,000; sales by American in the Eastern area of gypsum board manufactured by it amounted to approximately \$460,000; sales by Kelley Plasterboard in the Eastern area of gypsum board manufactured by it amounted to approximately \$118,000; and sales by Texas in the Eastern area of gypsum board manufactured by it amounted to approximately \$252,000. By virtue of the agreements described in Paragraphs 85 and 86 of the complaint, U.S.G., by 1930, was anthorized to control the price of all gypsum board sold in the Eastern area except that manufactured by Texas. Said price control was to last by the terms of said agreements until a date 17 years after the date of issuance of patents not then issued. By virtue of said agreements, all companies manufacturing and selling board in the Eastern area, except Texas, were obliged to manufacture a uniform, standardized board."

7. Strike the second sentence of Paragraph 88 of the complaint and substitute in lieu thereof the following:

"Since this time, U.S.G. has controlled the prices of all gypsum board sold in the Eastern area."

Grant W. Kelleher,
GRANT W. KELLEHER,
Special Assistant to
the Attorney General.
Geo. B. Haddock,

GEORGE B. HADDOCK, Special Attorney.

Thurman Arnold,
THURMAN ARNOLD,
Assistant Attorney General.

220 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Answer of defendants, Frederick G. Ebsary, and Ebsary Gypsum Company, Inc.

Filed July 30, 1941

The defendants, Frederick G. Ebsary and Ebsary Gypsum Company, Inc., answering the complaint herein, as amended:

1. Will adopt and sometimes hereinafter refer to the persons, firms and corporations mentioned in the complaint by the abbreviated names or initials used in the complaint

to designate such persons, firms and corporations.

2. Admit that Ebsary and one or more of the other defendant companies are engaged in the business of selling and delivering certain gypsum products, including board and plaster, to dealers in the District of Columbia, and soliciting orders from dealers for such products in said District, and otherwise promoting the sale of gypsum products in said District; that the defendant companies are engaged in the manufacture of gypsum products at plants located at various points throughout the United States, and sell gypsum products to dealers and distributors in interstate commerce, and some of them in commerce between the states and the District of Columbia; admit that Ebsary operates but one manufacturing plant, and that its sales in the Eastern area of gypsum board manufactured by it am unted to approximately \$670,000.00 in 1939; admit that Ebsar has been engaged in the manufacture of gypsum blocks since 1911 and has been engaged in the manufacture of plaster since 1918, and has, since 1928, manufactured gypsum board; admit that Ebsary entered into license agreements with U. S. G. as set forth in Exhibits "3" and "6" annexed to the complaint; that except as hereinabove expressly admitted or denied, these defendants and each of them are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs of the complaint numbered, respectively, 2, 3, 20, 24, 31, 32, 33, 34, 35, 36, 37, 38, 50, 51, 53, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 81, 101 and 102.

3. Deny each and every of the averments contained in paragraphs of the complaint numbered 4, 44, 45, 46, 47, 54, 77, 96, 97, 103, 104, 107, 108, 109, 110,

111 and 121.

4. Admit in substance the averments contained in paragraphs of the complaint numbered 26, 27, 28, 29 and 79 except the last sentence of said paragraph 79, but deny that the descriptions therein contained as to the composition and processes of manufacture of the products therein mentioned are accurate or complete and deny that the manufacture of said products only involves simple operations and allege that such manufacture requires extensive machinery and plants, coupled with extensive chemical and mechanical knowledge and skill; that these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in the last

sentence of said paragraph 79. 5. Admit that Ebsary and certain of the other defendants have been and are operating, or became or have become obligated to operate their patented gypsum board business under the terms of the patent license agreements made by them respectively with U.S. G. similar to the agreement referred to in the complaint marked Exhibit No. 6; deny that gypsum board is usually transported or shipped in mixed cars or trucks of board, plaster and miscellaneous gypsum products, and deny that straight carload or truckload shipments of board are infrequent; deny that Ebsary ever sold a substantial part of the board and plaster manufactured by it to jobbers or to manufacturing distributors; deny that since 1929 Ebsary has refrained from selling gypsum products (other than board) to contractors; except as is herein denied, these defendants admit the averments contained in paragraphs 39, 40, 41, 42 and 43 of the complaint, insofar as they relate to the manner of operation of the gypsum board business by Ebsary; that except as is herein admitted or specifically denied, these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in said paragraphs 39, 40, 41, 42 and 43.

6. Admit that during the year 1928 the prices of certain gypsum products including plaster and block, were substantially lower than the prevailing prices in 1927; except as is herein admitted, these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 73 of the

complaint.

7. Admit that in May, 1929, there was a meeting or conference between these defendants and U. S. G. and others, at which there was discussed the granting by U. S. G. to the defendant Ebsary and others of a license to use

various patents in the manufacture of gypsum board, upon terms substantially similar to those subsequently embodied in the agreement (Exhibit No. 3 annexed to the complaint) and that on or about the 22nd day of May, 1929, Ebsary entered into said license agreement, a copy of which is set forth in said Exhibit No. 3; admit that prior to May, 1929 Ebsary had conferred with others concerning the contemplated license; admit that a copy of the patent issued to Charles E. Hite on June 17, 1917 is annexed to the complaint as Exhibit No. 4 and that a copy of the patent issued to Joseph F. Haggerty on July 8, 1924 is annexed

to the complaint as Exhibit No. 5; deny that the scope or purport of said patents is other than as specifically

set forth in said patents respectively; deny that U. S. G. advised these defendants, or either of them, that the Hite and Haggerty patents were of doubtful validity or that the foam process did not infringe said patents; that except as is herein admitted or denied, these defendants deny the averments of paragraphs 74, 76, 80, 82 and 99 of the complaint insofar as said averments relate to or concern these defendants and these defendants are without knowledge or information sufficient to form a belief as to the truth of the other averments contained in said para-

graphs 74, 76, 80, 82 and 99.

8. Admit that the expiration date of one of the several Utzman patents included in the license agreements (Exhibits 3 and 6 annexed to the complaint), was in August, 1929; admit that Ebsary became a licensee of U. S. G.; that except as is herein admitted, these defendants deny the averments of paragraph 75 of the complaint insofar as any of said averments directly or indirectly refer (a) to these defendants or either of them, (b) to their state of mind, (c) to representations and assurances made to these defendants, (d) inducements offered to these defendants; that except as is herein specifically admitted or denied, these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 75 of the complaint.

9. Admit that U. S. G. offered to various of its licensees, including Ebsary, an additional or new license agreement permitting them and it to manufacture gypsum board by use of the foam process; deny so much of paragraph 78 of the complaint as in effect alleges that U. S. G. offered the additional license agreements for use of the so-called foam process/pursuant to any agreement with the defend-

ant, Ebsary, to continue price control after the expiration of the Utzman patent or to give color of legality to any price control by purporting to base it on licenses covering patents on the foam process; deny that there existed at any time any agreement to which Ebsary was a party in any way relating to or affecting the control of prices of gypsum products, other than those contained in the written patent license agreements made by Ebsary with U. S. G., copies of which are annexed to the complaint; deny the averments contained in the last sentence of paragraph 78; these defendants are without knowledge or information sufficient to form a belief as to the truth of each and all of the other averments in paragraph 78 of the complaint.

10. Admit that after U. S. G. had acquired or had arranged for the acquisition of the Hite and Haggerty patents and on or about October 18, 1929, Ebsary entered into a new patent license agreement with U. S. G., which included the Hite and Haggerty patents, a copy of which agreement is annexed to the complaint and marked Exhibit No. 6 and which agreement superseded the earlier license agreement held by Ebsary from U.S.G.; deny that Ebsary made any agreement with U.S.G. in regard to the Hite and Haggerty patents or in relation to the use of the foam process or in relation to the manufacture or bundling of gypsum board other than is contained in the written agreement of October 18, 1929, annexed to the complaint as Exhibit No. 6; deny that the summary of said agreement as contained in paragraph 85 of the complaint is adequate or complete; deny that said agreement of October 18, 1929 was made by Ebsary for the purpose of giving color of legality to any price control by

223 U. S. G.; deny that Ebsary made any agreement with any other licensee of U. S. G., in relation to the so-called Hite and Haggerty patents, or either of them, or in relation to any other patent owned or controlled by U. S. G., or of or concerning any price control; deny that Ebsary made any agreement with U. S. G., or anyone else concerning any price control other than is contained in its written patent license agreements annexed to the complaint, to the actual and complete terms thereof reference thereto is hereby made; that except as is herein specifically admitted or denied, these defendants deny the averments of paragraphs 83, 84, 85 and 86 of the complaint insofar as said averments relate to these defendants or either of them; these defendants are without knowledge

or information sufficient to form a belief as to the truth of each of the other averments contained in paragraphs of

the complaint numbered 83, 84, 85 and 86.

11. These defendants admit that in 1929, the sales of gypsum board by Ebsary in the so-called Eastern area, amounted to approximately \$200,000.00, and that the license agreement made between Ebsary and U. S. G. in October, 1929, a copy of which is annexed to the complaint as Exhibit No. 6, is now in effect and has been continuously in effect since at or about the date thereof; these defendants deny the averments of paragraphs 87 and 88 of the complaint as to the interpretation and effect of the several agreements therein referred to, and except as is herein specifically admitted or denied, these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 87 and 88 of the complaint.

12. Deny the allegations of paragraph 89 of the complaint insofar, as they purport to allege the formation," maintenance or existence of any combination of any character between Ebsary and any other party mentioned in

said complaint.

13. Admit that U. S. G., pursuant to the terms of its patent license agreements, has from time to time issued and circulated bulletins among the licensees, setting forth the minimum prices and terms at which it fixed and determined for the sale of its gypsum board and which its several licensees (including Ebsary) were, under their respective license agreements, required by such agreements to sell their patented gypsum board (embodying the inventions and improvements set forth or claimed in one or more of the currently existing patents referred to in the respective license agreements); further admit that Exhibit No. 7 annexed to the complaint contains copies of certain bulletins issued by U. S. G. and that some of the bulletins issued by said U.S.G. in advising said licensees of U.S.G.'s minimum terms, referred to some of the subject matters outlined in subdivisions (a) to (u) inclusive of paragraph 91 of the complaint; except as is herein admitted, these defendants deny the allegations of paragraphs 90 and 91 of the complaint.

14. Deny the averments of paragraphs 93 and 94 of the complaint insofar as they relate to or are intended to relate to these defendants or either of them; that except as is herein specifically denied, these defendants and each of them are without knowledge or information sufficient to

form a belief as to the truth of the averments contained in said paragraphs 93 and 94.

1932 there were several meetings of representatives of U. S. G. and its patent licensees, which meetings were all for lawful purposes and primarily to more clearly understand the terms and conditions of sales permitted by the licensees under the license agreements and the bulletins issued pursuant thereto; that U. S. G., from time to time, issued bulletins which, in effect, under the license agreements precluded sales by Ebsary of plaster board (embodying patents owned by U. S. G.) to jobbers at less than dealer prices; that such terms of said bulletins remained effective; admit that Ebsary adhered to the written license agreement from U. S. G.; other than is herein admitted, these defendants deny the averments contained in paragraph 95 of the complaint.

16. Admit the alleged dates of issuance of the patents upon the so-called "foam process" and that copies of said patents are annexed to the complaint as Exhibits Nos. 8, 9 and 10; deny the averments contained in the last sentence of paragraph 98; aver that from November, 1929 until October, 1935 U. S. G. exercised the right to fix the minimum selling price on gypsum board manufactured by Ebsary embodying the inventions covered by the Hite and Haggerty patents; that except, as is herein specifically admitted, or specifically denied, these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 98 of the

17. Admit that a copy of the Haggerty patent is annexed to the complaint and marked Exhibit No. 5 and contains a complete statement of the invention thereby patented; admit and allege that Ebsary used adhesives in the manufacture of gypsum board within the scope of the Haggerty patent; that except as is herein admitted, these defendants deny the allegations of paragraph 100 of the complaint insofar as they refer to these defendants, and otherwise deny knowledge or information sufficient to form a belief as to the truth of the averments contained in said paragraph in relation to the other defendants.

18. Admit that where quotations for gypsum products to be used upon specific jobs have been made to a customer or prospective customer by Ebsary, it has been the general policy and practice of Ebsary and in accordance with the customs and usages of the gypsum industry, to give

to such customer or prospective customer protection against price increases for a reasonable time and to sell to such purchaser the material required for such specific job at the prices quoted therefor, notwithstanding that such prices have been increased prior to the purchase; except as is herein admitted, these defendants deny the allegations of paragraph 106 of the complaint, insofar as they relate or purport to relate, to these defendants or either of them, and insofar as such allegations relate to other manufacturers, these defendants deny knowledge or information sufficient to form a belief as to the truth of the averments contained in said paragraph 106.

19. Admit that U. S. G. and certain of its licensees entered into separate agreements covering the manufacture and sale of metalized gypsum board and perforated lath and that in 1935 Ebsary and other licensees entered into license agreements with U. S. G. to manufacture metalized gypsum board under certain patents therefor owned by U. S. G., and that a copy of such agreement with Ebsary is annexed to the complaint as Exhibit No. 11; admit that

U. S. G. has since the date of such agreement determined the minimum prices and terms at which Ebsary might sell patented metalized board manu-

factured by it under such licenses; admit that some of the other licensees at or about the same time entered into similar agreements with said U.S.G.; that except as is herein admitted, these defendants deny each and every of the averments contained in paragraphs 112, 113 and 114 of the complaint insofar as they in any way relate or refer to these defendants or either of them; that except as is herein specifically admitted or denied, these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in each of the paragraphs 112, 113 and 114 of the complaint.

20. Admit that on or about February 2nd, 1937, Ebsary entered into a license agreement with U, S. G. for the license to use Letters Patent of the United States number 1,938,354, relating to a plaster board perforated lath, said agreement being in substantially the same form and effect as the agreement between Certain-teed Products Co. and U. S. G. annexed to the complaint and marked Exhibit No. 12: further admit that pursuant to said license agreement, Ebsary sold perforated gypsum lath embodying the inventions included within the claims of said patent at not less than the minimum prices fixed by U. S. G. pursuant to said agreement; these defendants deny that said agree-

ment was induced or made upon any other consideration than is therein named, and deny that said agreement was not, in fact, a bona fide license agreement made in good faith by Ebsary, and deny that Ebsary entered into said agreement for the purpose of aiding or abetting any illegal price control by U. S. G. or others, and deny that said agreement was not one normally and reasonably adapted for the protection of the respective parties thereto under the letters patent and to secure to Ebsary the right to the use of said patent and protection against claims for damage for infringement thereof if used by Ebsary; that except as herein expressly admitted or denied, these defendants have no knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 116, 117 and 118 of the complaint.

21. Deny each and every of the averments contained in paragraph 119 of the complaint insofar as they in any manner relate to any act, intent, knowledge, or purpose of these defendants, or either of them; deny the last sentence of paragraph 119; that except as is hereinabove specifically denied, these defendants and each of them are without knowledge or information sufficient to form a belief as to the truth of the averments contained in said

paragraph 119:

22. Admit that Ebsary has not contested with U. S. G. the validity of the perforated lath patent (Letters Patent of the United States No. 1,938,354); that except as is herein admitted, these defendants and each of them are without knowledge or information sufficient to form a belief as to the truth of the averments contained in para-

graph 120 of the complaint.

23. Deny the formation, operation and existence of any combination to which these defendants, or either of them, were parties; admit that Ebsary has during most of the period since 1929 realized a modest profit from the operation of its business as a whole (of which business the manufacture and sale of gypsum board formed a part), but these defendants deny that such profits were excessive or in excess of the average profits of Ebsary

sive or in excess of the average profits of Ebsary during the previous years; except as is herein specifically admitted or specifically denied, these defendants have no knowledge or information sufficient to form a helief as to the truth of the averments contained in paragraph 122 of the complaint.

24. Admit that there may have been and may now exist some uniformity between certain of the terms and con-

ditions of sale required by the several license agreements from U. S. G. mentioned in the complaint (applicable to patented gypsum board) and the terms and conditions of sale used by one or more of the defendants in the sale of their other products, but deny that any such uniformity is due to any agreement or understanding between these defendants or either of them with any other person, firm or corporation; these defendants allege that the uniformity among the defendant companies of the terms and conditions of sale and distribution of gypsum board, plaster and miscellaneous gypsum products, is primarily due to customs and usages pertaining to the gypsum industry, and which have existed over a period of many years and prior to any of the acts complained of in the complaint; that such customs and usages were at all times lawful; that such uniformity is also in part due to the establishing of rules for the gypsum industry under the direction and approval of the Federal Trade Commission, pursuant to law, which rules were so adopted on or about June 10th, 1929; that such uniformity is also in part due to the "Code of Fair Competition for the Gypsum Industry" duly adopted by the industry and approved by the President of the United States pursuant to the provisions of the National Industrial Recovery Act of 1933; that Ebsary has been a member of said gypsum industry for over thirty years, and as a member of such industry, has conducted its business in accordance with the lawful usages and customs of said industry and was obligated by law to conduct its business in accordance with the existing rules of the industry as approved by the Federal Trade Commission, and as were contained in the aforesaid Code of Fair Competition for the Gypsum Industry. These defendants further allege that all acts and things done by them or either of them pursuant to the said rules for said industry approved by the Federal Trade Commission or done pursuant to the aforesaid Code, were lawful and were done pursuant to law: that except as is herein admitted, these defendants deny each and every of the averments contained in paragraph 123 of the complaint insofar as they refer to these defendants; except as is herein specifically admitted, explained or denied, these defendants deny knowledge or information sufficient to form a belief as to the truth of the averments contained in said paragraph 123.

25. Further answering the complaint, these defendants

allege:

A. Ebsary entered into each of the several written license agreements mentioned in the complaint, in good faith and in order to obtain the right, license and privilege of using and/or adopting the inventions referred to therein to the uses and purposes of its own legitimate gypsum business to such extent as it might from time to time appear to Ebsary to be desirable.

B. That all of the acts in fact done by these defendants and which are referred to in said complaint were done in compliance with the written terms and conditions of the respective license agreements or for the purpose of trying to obtain and secure the full benefits of the rights and privileges granted by U. S. G. to Ebsary by said agreements, and to which Ebsary became lawfully entitled, and for which Ebsary became obligated to and did pay a royalty to U.S.G.

227. C. That these defendants did not engage in any conspiracy or combination to restrain trade or do any act or thing contrary to the anti-trust laws of the

United States.

D. That these defendants had no purpose or motive in making said license agreements other than is clearly expressed in the terms thereof, and if any of the other parties to any of said license agreements had any other, different or additional purpose or motive, the same was and is unknown to these defendants.

26. These defendants deny each and every averment of said complaint inconsistent with any of the allegations set forth and contained in the last preceding paragraph of

this answer and numbered 25.

WHEREFORE defendants demand judgment that the complaint herein be dismissed with costs.

Dated, July 29th, 1941.

TUMULTY & TUMULTY. JOSEPH P. TUMULTY, JR., TUMULTY & TUMULTY. Attorneys for Defendants, Ebsary Gypsum Company, Inc. and Frederick G. Ebsary, 1317 F Street, N. W., Washington, D. C.

BLACK, VARIAN & SIMON. ALFRED W. VARIAN. HERBERT M. SIMON. Of Counsel,

60 Wall Street, New York City.

Receipt of a copy of the foregoing answer is hereby acknowledged this 30th day of July 1941.

GEO. B. HADDOCK,

Special Assistant to the Attorney General.

228 In the District Court of the United States For the District of Columbia

Title omitted.

[File endorsement omitted.]

# Answer of Samuel M. Gloyd Filed July 31, 1941

Comes now Samuel M. Gloyd, a defendant, designated herein as Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company, and for his answer to the complaint, the amendment thereto,

and the bill of particulars states as follows:

1. He admits that the complaint was filed and the proceedings instituted against him and other defendants under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", said act being commonly known as the "Sherman Antitrust Act", but denies that either acting alone or in conjunction with any other person, firm, or corporation, he has heretofore vio-

lated or is now violating said Act or any Section or part thereof as alleged in the complaint, or otherwise.

2. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in reference to the other defendants, or any of them in paragraph 2 and states that he has not at any time engaged in the business of selling and delivering gypsum products to dealers and consumers within the District of Columbia, and has not otherwise engaged in business therein, either now or at any time mentioned in the complaint.

3. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of

them, in paragraph 3 of the complaint.

4. He denies each and all of the statements in paragraph

4 of the complaint.

5 to 19, inclusive. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraphs 5 to 19, both inclusive, of the complaint, except that he admits the statements in paragraph 11.

20. He denies each and all of the statements in paragraph 20 of the complaint as amended except that he admits he is engaged in the manufacture of gypsum products, with a plant at Plasterco, Texas, and sells said products principally east of the Rocky Mountains and west of the Allegheny Mountains in the southwestern states, and states that he is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in reference to the other defendants, or any of them, in said paragraph 20 as amended, or in reference to the percentages of gypsum board or plaster sold by defendant companies.

21. He admits the statements in paragraph 21 of the complaint but states that the description of gypsum and the manufacturing process thereof is very meager and

incomplete.

231 22. He admits sentences 1 and 2 of paragraph 22 of the complaint but is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in sentence 3 of said paragraph.

23. He admits the statements in paragraph 23 of the

complaint.

24. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any

of them, in paragraph 24 of the complaint.

25. He admits sentences 1 and 3 of paragraph 25 of the complaint but is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them in sentences 2 and 4 of said paragraph.

26. He denies each and all of the statements in paragraph 26 of the complaint except that he admits the plaintiff has

described gypsum board in a general way.

27. He admits the statements in paragraph 27 of the

complaint.

28. He admits sentences 1 and 2 of paragraph 28 of the complaint except he states that the manufacture of plaster involves expensive equipment and many manufacturing problems, and is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in sentence 3 of said paragraph.

29. He admits the statements in paragraph 29 of the complaint but states that the description of the process of manufacturing gypsum board is very meager and incom-

plete.

30. He admits the statements in paragraph 30 of the

complaint.

31. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 31 of the complaint as amended.

32. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any

of them, in paragraph 32 of the complaint.

232 33. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 33 of the complaint as amended.

34. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of

them, in paragraph 34 of the complaint.

35. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of

them, in paragraph 35 of the complaint as amended.

36. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 36 of the complaint as amended as to whether or not Celotex, Ebsary, and Newark are single plant operators, or as to the percentage or dollar value of their sales in 1939, or at any other time, or as to said approximate sales of 11% for gypsum board and 10% for plaster in the eastern area. He states that in 1939 his sales of gypsum board in the area designated in his answer to paragraph 20 of the complaint as amended amounted to approximately \$230,000.00.

37. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any

of them, in paragraph 37 of the complaint.

38. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 38 of the complaint, except that he states that he has been manufacuring plaster since about 1902 and gypsum board since about 1924.

39. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in reference to other persons, firms, or

corporations, or the other defendants, or any of them, in paragraph 39 of the complaint, and states that he sells gypsum board and plaster both in interstate and intrastate commerce and at all times has sold principally to retail building material dealers located throughout his trade area, with occasional sales in the earlier years of his business, to contractors, and that he has not at any time had any agreement or understanding with any of the

other defendants in reference to the selection of his customers or to the effect that he would refrain from selling

said gypsum products directly to contractors.

40. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in reference to the other defendants, or any of them, in paragraph 40 of the complaint, and states that the gypsum products from his plant are transported principally by rail, in mixed cars, and in some instances, by truck.

41. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in reference to the other defendants, or any of them, in paragraph 41 of the complaint, and states that he sells his gypsum products in the states and area designated in his answer to paragraph 20 of the complaint as amended.

42. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in sentences 1 and 2 of paragraph 42 of the complaint, in reference to the other defendants, or any of them, but denies each and all of the statements therein as applicable to him except he admits that he sells gypsum products in interstate commerce and ships a part of said products in mixed cars or trucks, but has not sold and does not sell to manufacturing distributors, and he is without knowl-

edge or information sufficient to form a belief as to the truth of the statements contained in the

third sentence of said paragraph.

43. He denies each and all of the statements in paragraph 43 of the complaint as applicable to him except that he is without knowledge or information sufficient to form a belief as to the truth of the statements as applicable to the other defendants, companies, or parties, and answering further he states that he sold gypsum board and plaster both in interstate and intrastate commerce and at all times sold principally to retail building material dealers located throughout his trade area, with occasional sales to contractors.

44. He denies each and all of the statements in paragraph 44 of the complaint.

45. He denies each and all of the statements in para-

graph 45 of the complaint.

46. He denies each and all of the statements in paragraph 46 of the complaint. Answering further, this defendant states that at various times he entered into license agreements with the United States Gypsum Company, under which he manufactured and sold gypsum products, and in connection therewith, negotiated and dealt only with said United States Gypsum Company and without any agreement or understanding with any other person, firm, or corporation. Said license agreements were made in good faith and in the belief that the United States Gypsum Company had basic patents under which the license privileges were granted for the manufacture of gypsum products and all of said agreements were made in due course of business and for legal purposes, and relying upon the validity of said patents and the use of said privileges granted in the license agreements, he expended large sums of money in equipping his plant for the manufacture of gypsum products.

47. He denies each and all of the statements in paragraph

47 of the complaint.

48. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in sentences 1 and 2 of paragraph 48 of the complaint, but admits the statements in sentences 3, 4 and 5 of said paragraph.

49. He admits the statements in paragraph 49 of the

complaint.

50. He admits the statements in paragraph 50 of the

complaint.

51. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in sentences 1 and 2 of paragraph 51 of the complaint, but admits the statements in sentences 3 and 4 of said paragraph.

52. He admits the statements in paragraph 52 of the

complaint.

53. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in sentences 1 and 2 of paragraph 53 of the com-

plaint, but admits sentence 3 of said paragraph.

54. He denies each and all of the statements in paragraph 54 of the complaint except that he is without knowledge or information sufficient to form a belief as to the truth of the statements with respect to the efforts of other parties to settle the litigation referred to in said paragraph.

55. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of

them, in paragraph 55 of the complaint.

56. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 56 of the complaint.

57. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of

them, in paragraph 57 of the complaint.

236 58. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 58 of the complaint.

59. He denies each and all of the statements in paragraph 59 of the complaint except that he is without knowledge or information sufficient to form a belief as to the truth of the statements as applicable to companies or parties other than this defendant.

60. He denies each and all of the statements in paragraph 60 of the complaint except that he is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, as applicable to other companies

or parties, or any of them, in said paragraph.

61. He denies each and all of the statements in paragraph 61 of the complaint except that he is without knowledge or information sufficient to form a belief as to the truth of the statements as applicable to companies or members of the industry other than this defendant, and except that he avers that he did enter into the license agreement of April 18, 1927, with the United States Gypsum Company as hereinbefore stated.

62. He denies each and all of the statements in paragraph 62 of the complaint as applicable to him, and is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in said paragraph in reference to the other companies, or any of them. He denies specifically that either individually or in conjunction with any other person, firm, or corporation, he urged that there should be control of licensee prices beyond 1929 and states specifically that under his license agreement of April 18, 1927 he was not subject to any minimum prices as fixed by said price bulletins beyond August, 1929.

63. He denies each and all of the statements in paragraph 63 of the complaint except that he is without knowl-237

edge or information sufficient to form a belief as to the truth of the statements as applicable to member of the industry other than this defendant. Further answering, he denies that he made any proposal to the effect that said license agreement should cover only the remainder of the period of the Utzman patent.

64. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any

of them, in paragraph 64 of the complaint.

65. He denies each and all of the statements in paragraph 65 of the complaint except that he is without knowledge or information sufficient to form a belief as to the truth of the statements as applicable to members of the industry other than this defendant, and, further answering, denies that he had any conferences with Griswold, Blagden, or anyone else except United States Gypsum Company and its representatives with reference to accepting licenses, but states that he did enter into a license agreement with United States Gypsum Company on April 18, 1927 and that said agreement was not the result, either directly or indirectly, of any persuasions, meetings, or conferences with anyone except with the representatives of the United States Gypsum Company in due course of negotiations for said license agreement.

66. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in reference to the other licensees, or any of them, in paragraph 66 of the complaint but states that after the execution of said license agreement of April 18, 1927 he complied with the terms thereof in regard to minimum prices at which he might sell the patented board manufactured by him, as shown in the bulletins issued by the United

States Gypsum Company.

67. He denies each and all of the statements in paragraph 67 of the complaint except that he is without knowl-

238 edge or information sufficient to form a belief as to the truth of the statements as applicable to other members of the industry or any of them, and, further answering, denies that he capitulated in any manner in securing said license agreement to enable him to manufacture and market a product protected by patents and to meet the demands of his trade, all of which he considered, and now considers, beneficial to his business, and in securing said license agreement he did not act in conjunction with other manufacturers nor for the purpose of securing unanimity of action in the stabilization of board prices, but did act independently of other manufacturers except, United States Gypsum Company, the owner of the patent, and from whom he secured said license agreement.

68. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of

them, in paragraph 68 of the complaint.

69. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 69 of the complaint except that he

knew that during certain times second grade board was being manufactured and sold.

70. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 70 of the complaint.

71. He is without knowledge or information sufficient toform a belief as to the truth of the statements, or any of

them, in paragraph 71 of the complaint.

72. He denies each and all of the statements in paragraph 72 of the complaint as applicable to him except he states that there were times he did manufacture and sell second grade closed-edge board at competitive prices with other similar product, but is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in said paragraph in reference to United States Gypsum Company and its other licensees.

73. He denies each and all of the statements in paragraph 73 of the complaint as applicable to him except he states that his prices were governed by the terms of his contract of April 18, 1927, and he states that he is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in said paragraph in reference to other manufacturers, or any of them.

74. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of

them, in paragraph 74 of the complaint.

75. He is without knowledge or information sufficient to form a belief as to the truth of the statement, or any of them, in paragraph 75 of the complaint except that he

knew the Utzman patent expired in 1929.

76. He denies each and all of the statements in paragraph 76 of the complaint except that he is without knowledge or information sufficient to form a belief as to the truth of the statements as applicable to licensees or companies, or any of them, other than this defendant, and, further answering, denies that he was present at any meetings or conferences or had a representative at any such meetings or conferences, and denies that he entered into any agreements except said license agreement of April 18, 1927.

77. He denies each and all of the statements in paragraph

77 of the complaint.

78. He denies each and all of the statements in paragraph 78 of the complaint as applicable to him except he states that United States Gypsum Company represented

that it was the owner of certain patents, or had applications pending, referred to as the foam process, and offered to enter into a license agreement, but that he did not enter into any such agreement until in February, 1937, and

states that he is without knowledge or information

sufficient to form a belief as to the truth of the statements, or any of them, in said paragraph in reference to the other defendants, or any of them. Answering further, he denies the existence of any such agreement as alleged in the last sentence of said paragraph.

79. He admits the statements in sentences 1 and 2 of paragraph 79 of the complaint and is without knowledge or information sufficient to form a belief as to the truth of

the statements in sentence 3 of said paragraph.

80. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 80 of the complaint except that he admits that said Haggerty patent is set forth as Exhibit 5 in the Appendix to the complaint and states that the summary of said patent set forth in said paragraph is incomplete and inaccurate.

81. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any

of them, in paragraph 81 of the complaint.

82. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in sentences 1 and 2 of paragraph 82 of the complaint, but denies that United States Gypsum Company advised him that the Hite and Haggerty patents were of doubtful validity or that the foam process did not infringe said patents.

83. He denies each and all of the statements in paragraph 83 of the complaint except that he is without knowledge or information sufficient to form a belief as to the truth of the statements as applicable to licensees or any of them

other than this defendant.

84. He denies each and all of the statements in paragraph 84 of the complaint except that he states that he was informed that United States Gypsum Company had acquired said Haggerty and Hite patents.

241 85. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 85 of the complaint.

86. He denies each and all of the statements in paragraph 86 of the complaint.

87. He denies each and all of the statements in paragraph 87 of the complaint as amended as applicable to him except he admits that he was not obliged to manufacture a uniform standardized board, and states that his sales in his trade area described in his answer to paragraph 20 of the complaint as amended, for the year 1929 were approximately \$250,000.00, and states that he is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in said paragraph in reference to the other defendants, or any of them. Answering further, he denies the existence of any agreement of the character described in paragraph 86 of the complaint.

88. He denies that after the expiration of the 1927 license agreement with United States Gypsum Company any new agreement was made by threats or under duress as stated in sentence 1 of paragraph 88 of the complaint, but states that in February, 1937 he and United States Gypsum Company entered into a new license agreement, after negotiations, which was the result of their free and voluntary acts and without any conferences, agreements, or understanding, either directly or indirectly, with any other person, firm, or corporation. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in sentences 2, 3,

4, and 5 of said paragraph.
89. He admits the application of the word "licensee" as it may be applied to him in paragraph 89 of the complaint, but denies the formation or evitage of any combination.

but denies the formation or existence of any combination, agreement, or understanding as set forth in the complaint, or otherwise.

90. He denies each and all of the statements in paragraph 90 of the complaint except that he is without knowledge or information sufficient to form a belief as to the truth of the statements contained in the first two sentences of said paragraph as applicable to United States Gypsum Company and its licensees, or any of them, other than this defendant. Answering further, he denies that United States Gypsum Company has determined and fixed his selling prices and terms and conditions of sale in any manner, either directly or indirectly, except as provided for in said license agreements of April 18, 1927, and February 10, 1937.

91. He denies each and all of the statements in paragraph 91 of the complaint as applicable to him except he states that from April, 1927 to August, 1929, from time

to time, he received from United States Gypsum Company price bulletins fixing minimum prices in accordance with the terms of his license agreement. After August, 1929 and until February, 1937 he did not receive any minimum price bulletins and was not governed in any manner by price bulletins issued by the United States Gypsum Company or anyone else, but his license agreement of February 10, 1937 with United States Gypsum Company provided for minimum price bulletins and he has complied with the terms of said agreement. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in said paragraph in reference to United States Gypsum Company and its other licensees. Answering further, he admits that copies of certain of said minimum price bulletins are set forth in Exhibit 7 in the Appendix to the complaint but denies that subparagraphs (a) to (u), inclusive, of said paragraph 91 accurately or sufficiently describe the terms and provisions of said minimum price bulletins.

92. He denies the statements contained in paragraph 92 of the complaint except that he is without knowledge or

information sufficient to form a belief as to the 243 truth of the statements, or any of them, in reference

to United States Gypsum Company and its other licensees, or any of them, and states that he has made reports of sales from time to time and otherwise complied with said license agreements, and denies that he attended any meetings with the United States Gypsum Company or other licensees at which the prices and terms and conditions of sale as set out in said bulletins were discussed, or any agreements made in reference thereto.

93. He denies each and all of the statements contained in paragraph 93 of the complaint except that he is without knowledge or information sufficient to form a belief as to the truth of the statements contained in the second sentence of said paragraph insofar as they refer to United States Gypsum Company and licensees other than this defendant.

94. He denies each and all of the statements in para-

graph 94 of the complaint.

95. He denies each and all of the statements contained in paragraph 95 of the complaint, and, answering further, denies that he received or complied with any minimum price bulletins issued by United States Gypsum Company in 1932 or thereafter until February 10, 1937, the date of execution of his license agreement with said United States Gypsum Company. Answering further, this defendant

states that from the commencement of his business he has sold his gypsum products principally to dealers and only occasionally to jobbers and that said policy has not changed materially since 1929.

96. He denies each and all of the statements in para-

graph 96 of the complaint.

97. He denies each and all of the statements in para-

graph 97 of the complaint.

98. He admits the statements in sentences 1 and 2 of paragraph 98 of the complaint, but is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them.

in sentences 3 and 4 of said paragraph.

99. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of

them, in paragraph 99 of the complaint.

100. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 100 of the complaint except that the summary of the Haggerty patent contained in said paragraph is incomplete and inaccurate. Answering further, he states that during the period from November, 1929 to October, 1935, he was not a licensee under the Haggerty patent.

101. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 101 of the complaint except that he states that the gypsum board manufactured and sold by him under the provisions of his license agreement of February 10, 1937, with United States Gypsum Company did embody the inventions set forth and claimed in said

Haggerty patent and said foam patents.

102. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in sentences 1, 3, and 4 of paragraph 102 of the complaint, but admits the statements in sentence 2 of said paragraph.

103. He denies each and all of the statements in para-

graph 103 of the complaint.

104. He denies each and all of the statements in paragraph 104 of the complaint except he admits that he transported gypsum products in mixed cars or trucks.

105. He admits the statements in paragraph 105 of

the complaint.

106. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in reference to other manufacturers, or any of them, in paragraph 106 of the complaint, and denies each and all of the statements in said paragraph as

applicable to him.

107. He denies each and all of the statements in paragraph 107 of the complaint and states that he was not a member of the Gypsum Statistical Institute and did not participate in any of its activities.

108. He denies each and all of the statements in para-

graph 108 of the complaint.

109. He denies each and all of the statements in paragraph 109 of the complaint except that he is without knowledge or information sufficient to form a belief as to the truth of the statements in the first sentence thereof as applicable to United States Gypsum Company and its licensees other than this defendant.

110. He denies each and all of the statements in para-

graph 110 of the complaint.

111. He demies each and all of the statements in paragraph 111 of the complaint except that he is without knowledge or information sufficient to form a belief as to the truth of the statements contained in the last sentence of said paragraph.

112. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in reference to the other licensees, or any of them, in paragraph 112 of the complaint, and denies each and all of the statements in said paragraph as applicable to him.

113. He denies each and all of the statements in paragraph 113 of the complaint except that he admits that about 1934, or thereafter, United States Gypsum Company offered to enter into a license agreement to manufac-

6 ture and sell metallized board under patents owned

by the United States Gypsum Company, covering metallized gypsum board, but states that he did not enter into any such license agreement or agreements, and he is not informed as to whether or not Exhibit No. 11 is a substantial copy of the license agreement between Ebsary and United States Gypsum Company.

114. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in reference to the other defendants, or any of them, in paragraph 114 of the complaint, and denies each and all or the statements in said paragraph as applicable

to him.

115. It admits the statements in paragraph 115 of the complaint as applicable to him, and states that he is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in said paragraph in reference to the other defendants, or any of them.

116. He is without knowledge or information sufficient to

form a belief as to the truth of the statements, or any of them, in paragraph 116 of the complaint, but denies that to induce this defendant to enter into a perforated lath license agreement United States Gypsum Company agreed to fix the price of perforated lath at a differential above the price of straight lath.

117. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any

of them, in paragraph 117 of the complaint.

118. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 118 of the complaint.

119. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any

of them, in paragraph 119 of the complaint.

120. He is without knowledge or information sufficient to form a belief as to the truth of the statements, or any of them, in paragraph 120 of the complaint.

121. He denies each and all of the statements in

paragraph 121 of the complaint.

122. He denies each and all of the statements in paragraph 122 of the complaint.

123. He denies each and all of the statements in para-

graph 123 of the complaint.

Answering further, this defendant denies each and every material statement or allegation in said complaint, the amendment thereto, and the bill of particulars which he has not heretofore specifically denied, admitted, qualified, or explained, and as to all such matters where he is without knowledge or information sufficient to form a belief as to the truth of the statements or allegations and as to all matters denied, he calls upon the plaintiff to make strict proof thereof.

Wherefore, this defendant prays that the complaint and the amendment thereto be dismissed as to him, and at the

cost of the plaintiff.

D. I. Johnston,
D. I. Johnston,
D. I. Johnston,
Roy C. Lytle,
Roy C. Lytle,
Roy C. Lytle,
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824 Commerce Exchange Building, Oklahoma City, Oklahoma.
Geo. E. H. Goodner,
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Munsey Building, Washington, D. C.
Attorneys for Samuel M. Gloyd.

248 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

## Answer of defendant the Celotex Corporation Filed July 31, 1941

Now come the defendants, The Celotex Corporation and Bror G. Dahlberg, and, for answer to the complaint filed herein and the amendment to said complaint filed herein on June 5, 1941, severally admit, deny and aver, and otherwise make answer unto said complaint, as so amended, as hereinafter set forth.

## PART I

## ANSWER OF DEFENDANT THE CELOTEX CORPORATION

For answer to said complaint, as amended, as aforesaid, with each of the numbered paragraphs of this Part I being in answer to the paragraph of said complaint bearing

the same number, the defendant The Celotex Corporation (hereinafter in this Part I sometimes referred to as "this defendant") admits, denies and avers as follows:

1. Admits that the complaint is filed and that these proceedings are instituted against the several defendants under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," said act being commonly known as the "Sherman Antitrust Act," but denies (a) that this defendant, either alone or in conjunction with one or more of the other defendants to this action or any other person or persons, firm or firms, corporation or corporations, whatsoever, has heretofore engaged or is now engaged in any action or course of action prohibited or declared illegal by Section 1. Section 2 or Section 3 of said Sherman Antitrust Act. or by any other provision of said Act, and (b) that the plaintiff is entitled, under Section 4 of said Sherman Antitrust Act, to the relief prayed for in said complaint.

2. Denies each and all of the averments of Paragraph 2 insofar as they refer to the defendant, The Celotex Corporation, except that this defendant admits that this defendant is engaged in a continuous course of business in selling and delivering gypsum products, including gypsum board and plaster, to dealers within the District of Columbia, that it is engaged in soliciting through salesmen orders

for gypsum products from dealers within the District of Columbia and in promoting the sale of said gypsum products in the District of Columbia by advertising in the District of Columbia and by distributing price lists, bulletins and circulars among dealers within the District of Columbia; denies that this defendant is engaged in selling and delivering gypsum products to consumers within the District of Columbia or in soliciting orders for gypsum products from consumers within the District of Columbia or in promoting the sale of gypsum products in the District of Columbia by distributing price lists, bulletins and circulars among consumers within the District of Columbia; and avers that this defendant is without knowledge or informa-

tion sufficient to form a belief as to the truth of the allegations of paragraph 2 of said complaint in so far as the same refer to the other defendant companies.

3. Answering Paragraph 3 of the Complaint, this defendant denies that it may be found within the District of Columbia except that it admits that it maintains a sales office within the District of Columbia and maintains salesmen for the solicitation of business in said gypsum products as set forth in Paragraph 2 of this answer, and this defendant denies that it maintains a warehouse or warehouses within the District of Columbia or maintains duly authorized agents there for the transaction of business within the District of Columbia other than the salesmen for the solicitation of business as hereinbefore set forth. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 3 insofar as they refer to the defendant, United States Gypsum Company.

4. Denies (a) that this defendant is or has been a party to any unlawful combination, conspiracy or monopoly of the kind and character referred to in paragraph 4 of said complaint, (b) the formation, maintenance, operation or existence of the specific combination, conspiracy and monopoly referred to in said paragraph 4, and (c) that this defendant has performed any acts, either within or without the District of Columbia, in furtherance of any such

combination, conspiracy or monopoly.

5. Admits the allegations of paragraph 5 of said complaint and adopts the use of the phrase "U.S.G." therein set forth.

6. Admits the allegations of paragraph 6 of said complaint and adopts the use of the word "National" therein set forth.

7. Admits the allegations of paragraph 7 of said complaint and adopts the use of the word "Certain-teed" therein set forth:

8. Admits the allegations of paragraph 8 of said com-

plaint.

9. Admits the allegations of paragraph 9 of said complaint and adopts the use of the word "Ebsary" therein set forth.

252 10. Admits the allegations of paragraph 10 of said complaint and adopts the use of the word "Newark"

therein set forth.

- 11. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11 of said complaint, but this defendant adopts the use of the word "Texas" as therein set forth.
- 12. Adopts for the purpose of this answer the definition of the term "defendant companies" set forth in paragraph 12 of said complaint.

13. Admits the allegations of paragraph 13 of said com-

plaint.

14. Admits the allegations of paragraph 14 of said complaint.

15. Admits the allegations of paragraph 15 of said com-

plaint.

16. Admits that Bror Dahlberg, whose middle initial is "G" (not "H" as set forth in said complaint), is President of this defendant and Chairman of the Board of Directors of Certain-teed, and that his business address is 919 North Michigan Avenue, Chicago, Illinois.

17. Admits the allegations of paragraph 17 of said

complaint.

18. Admits the allegations of paragraph 18 of said complaint.

19. Admits the allegations of paragraph 19 of said

complaint.

20. Adopts the definition of the term "Eastern area" set forth in paragraph 20 of said complaint, as amended, as aforesaid; admits that each of the defendant companies is engaged in the manufacture of gypsum products, principally gypsum board and gypsum plaster, at one or more plants located throughout the United States, that each of the defendant companies sells a portion of the gypsum products so manufactured in interstate commerce in some or all of the States comprised within the Eastern area,

that each of the defendant companies, with the exception of Texas, sells a portion of such gypsum products

in commerce between the States and the District of Columbia to retail dealers in building products within the District of Columbia, and that the defendant companies manufacture and sell approximately 100% of all gypsum board but this defendant is without knowledge or information sufficient to form a belief as to whether said defendant companies manufacture and sell approximately 80% of all gypsum plaster currently manufactured, and sold in the Eastern area; avers that this defendant owns and operates a plant for the manufacture of gypsum products located at Port Clinton, Ohio; that the sales of gypsum products made by this defendant in the Eastern area are comprised of sales to retail dealers in building materials and sales to certain of the other defendant companies, and that this defendant does not sell gypsum products to consumers within the Eastern area; assuming the term "distributors", as used in paragraph 20 of said complaint is intended to describe the various small manufacturers of calcined gypsum and plaster referred to in paragraph 42 of said complaint and specifically named in subdivision II of the Bill of Particulars heretofore filed by the plaintiff in these proceedings, further avers that the last sale of gypsum products made by this defendant to any of said distributors was consummated during the year 1939, and avers that this defendant has no knowledge or information sufficient to form a belief as to whether the other defendant companies sell gypsum products to consumers or to manufacturing distributors within said Eastern area.

21. Admits the allegations of paragraph 21 of said complaint with respect to the description of gypsum, except that said description is not complete; and avers that no commercial deposits of gypsum rock are 100% pure gypsum, but that the mineral, as mined, is mixed with varying amounts of limestone, sand, shale, anhydrite, and sometimes minute quantities of rock salt and organic matter, and that the production of calcined gypsum or stucco employed in the manufacture of gypsum products used in the building construction industry, including gypsum board and gypsum plaster, requires the utilization of certain proc-

esses in addition to crushing and heating, such as grading and sorting, the removal of impurities, and the addition, during the heating process, of various substances for the purpose of controlling the setting time and other characteristics of the resulting product.

22. Adopting the definition of the term "gypsum board" set forth in paragraph 30 of said complaint, admits the allegations of the first two sentences of paragraph 22; but avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of the last sentence of said paragraph 22.

23. Admits the allegation of paragraph 23 of said com-

plaint.

24. Admits the allegations of the first four sentences of paragraph 24 of said complaint except that this defendant avers that there is no substantial difference in the character of the product known as gypsum lath and plaster board; and this defendant further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of the last two

sentences of said paragraph 24.

25. Admits that several years after the first commercial manufacture of plasterboard, a gypsum board, known as "wallboard" and designed to be used as a finished panel in place of plaster and lath in wall and ceiling structures, was introduced on the market, that gypsum wallboard is now one of the most important of various boards on the market which are used as substitutes for plaster and lath; but avers that this defendant is without knowledge or information sufficient to form a belief as to whether the sales value of gypsum wallboard manufactured by the defendant companies and sold in the United States in 1939 was approximately \$8,500,000, or whether approximately 90% of such gypsum wallboard was sold in the Eastern area, or as to the extent of the use by the United States Government of gypsum wallboard during the World War of 1914-18 in temporary structures such as barracks; and denies that such use by the Government of the United States has operated greatly to stimulate the production of gypsum wallboard.

26. Admits the allegations of paragraph 26 of said complaint, except that the description of the products therein contained is neither accurate nor

complete.

27. This defendant admits the averments contained in

paragraph 27 of the complaint.

28. Admits that the manufacture of plaster from calcined gypsum involves the addition of various substances in varying amounts for the purpose of retarding or accelerating the setting time of the finished product and the addition of hair or fiber in varying amounts for the pur-

pose of increasing the strength of the finished product, that the manufacture of gypsum board from calcined gypsum is a more complicated operation than the manufacture of gypsum plaster, that the manufacture of gypsum board requires expensive equipment and machinery, that substantially all gypsum calcining plants are equipped to manufacture gypsum plaster, and that gypsum calcining plants are not always equipped to manufacture gypsum board; denies that the manufacture of plaster from calcined gypsum involves a relatively simple operation; and avers that the gypsum plant of this defendant is equipped te produce and is producing gypsum plaster of many kinds, grades and qualities and possessing varying characteristics, dependent on the place at and the purpose for which the same is to be used and other considerations, and that such manufacture involves a high degree of control of conditions of manufacture, conformity to specifications and other factors, requiring a highly trained and skilled supervising and engineering personnel.

29. Admits that, in the manufacture of gypsum board, calcined gypsum is first mixed with water to form a thick plastic mass known as a slurry, that an adhesive to increase the bond between the core and the liners is mixed, either with the dry calcined gypsum or with the slurry, that to the slurry is added a so-called aggregate to lighten the weight of the finished board, that, until 1929, the most commonly used aggregate was sawdust, that, since 1929, the aggregate employed by this defendant has been composed in part of soap foam, which causes the formation of numerous minute voids in the board, and that, after the addition of the aggregate to the slurry, the mixture is

spread upon the lower liner and the upper liner is
256 placed upon the top of the mixture; but this defendant avers that it uses certain processes and materials
not used by others in its manufacture and avers further
that the description of the process for manufacture contained in paragraph 29 of said complaint is inadequate in
failing to set forth certain important aspects of said
process.

30. Adopts, for the purposes of this answer, the definition of the term "plaster," "lath," "plasterboard," "wallboard," "gypsum board" and "board" set forth in paragraph 30 of said complaint.

31. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 31 of said complaint.

32. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 32 of said complaint, except that this defendant admits that since 1925 U.S.G. has expanded into fields of other allied building materials and is now an important manufacturer of some of the materials enumerated in said paragraph 32.

33. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 33 of said complaint, as amended, except that this defendant admits that National is the second largest producer of gypsum products in the

United States.

34. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 34 of said complaint, except that this defendant admits that National has expanded into fields of other allied building materials and is now engaged in the production of some of the products enumerated in said paragraph 34.

35. Admits that Certain-teed is the third largest producer of gypsum products in the United States, that, in 1939, it produced approximately 11% of all gypsum board and approximately 10% of all plaster manufactured and sold in the Eastern area, that sales of gypsum board by Certain-teed in the Eastern area during the year 1939

amounted to approximately \$2,100,000, that Certainteed did not enter the gypsum industry until 1923 after it had become well established as an important

after it had become well established as an important producer of roofing materials, paints and varnishes and composition flooring, that, in 1923, Certain-teed entered the plaster business through the acquisition of six gypsum plants from Acme Cement Plaster Company, that Certain-teed did not commence the manufacture of gypsum board until 1926, that the manufacture of gypsum board by Certain-teed during the year 1926 was confined to a single plant, that in 1928, Certain-teed acquired the assets of The Beaver Board Companies, a Delaware corporation, and The Beaver Products Company, Inc., a New York corporation, that, in the year 1928, said The Beaver Products Company, Inc., had been for many years an important producer of fiber wallboard, that said The Beaver Products Company, Inc., entered the gypsum industry in 1920 through the purchase of the six gypsum plants of American Cement Plaster Company, at four of which plants gypsum board

was produced, and the single gypsum plant of Bestwell Manufacturing Company, which plant was also equipped to manufacture gypsum board, and that Certain-teed now operates five gypsum plants, at four of which gypsum board is produced; denies that, in 1923, or prior thereto, Certain-teed was an important producer of paper; and avers that Certain-teed is not presently engaged in the manufacture of paints and varnishes, that it has heretofore disposed of it composition flooring business to Sloane-Blabon Corporation, a Delaware corporation and a partially owned subsidiary of Certain-teed, and that Certain-teed is not now engaged in the manufacture of paper, except to the extent that it may be deemed to be so engaged as a result of its indirect ownership of the capital stock of The Beaver Wood Fibre Company, Limited, an Ontario corporation.

36. Admits that this defendant as well as Ebsary and Texas are single plant operators and that the allegations of said paragraph 36 of said complaint as amended, state with substantial accuracy the sales by this defendant of gypsum board manufactured by it in the Eastern area in 1939; and avers that, except to the extent that such allegations are admitted above, this defendant is without

knowledge or information sufficient to form a belief 258 as to the truth of the allegations of paragraph 36 of said complaint, as amended, as aforesaid.

37. Admits the allegations of paragraph 37 of said com-

plaint.

38. Admits that Ebsary and Newark and Texas are each engaged in the manufacture and sale of gypsum products but this defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations of paragraph 38 of said complaint, as amended.

39. Admits that this defendant sells some of the gypsum board and plaster manufactured by it in interstate commerce and in commerce between the States and the District of Columbia and that most of its gypsum products are sold to retail building material dealers located throughout a part of the Eastern area; avers that this defendant does not sell gypsum products directly to contractors: avers that this defendant is without knowledge or information sufficient to form a belief as to whether since 1929 the other defendant companies have not sold gypsum products directly to contractors; and avers that the discontinuance of or failure to make sales of gypsum products directly to contractors, whether on the part of this defendant or of the other defendant companies was not, and is not, the subject of any agreement, understanding or undertaking, either express or implied, between this defendant and any one or

more of the other defendant companies; further avers that it is without knowledge or information sufficient to form a belief as to whether each of the other defendant companies sells most of the gypsum board and plaster manufactured by it in interstate commerce and in commerce between the States and the District of Columbia to retail building material dealers located throughout the Eastern area; and further avers that only a small fraction of the gypsum board manufactured by this defendant and by all of the defendant companies in the aggregate is sold in commerce between the States and the District of Columbia. Further answering, defendant avers that from its inception it has had the policy of selling its principal products through the dealer trade and has built the good will of its business upon such a policy, and that when it acquired the gypsum

business formerly conducted by The American Gypsum Company it followed as to gypsum its estab-

lished practice, and this defendant accordingly admits that it has generally refrained from selling said gypsum products direct to contractors, as such sales would have destroyed, or tended to destroy, its principal means of distribution and alienate its established dealer outlets. As to all matters set forth in paragraph 39 of the complaint which are not admitted, qualified or denied, defendant is without knowledge or information sufficient to form a be-

lief as to the truth thereof.

40. Admits that the gypsum products manufactured by this defendant are transported by truck or railroad to the yards of dealers usually from the plants in which the products are manufactured but sometimes from warehouses owned by this defendant, and admits that gypsum board is frequently transported in mixed cars or trucks of board, plaster and miscellaneous gypsum products; but avers that, while straight carload shipments of board by this defendant are infrequent, straight truckload shipments of board are frequent; and further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 40 of said complaint so far as the same apply to other defendant companies.

41. Admits that this defendant sells gypsum products to retail dealers within all of the states embraced within the Eastern area and that the other defendant companies sell gypsum products in some of the states within the Eastern Area; but avers that this defendant is without knowledge or information sufficient to form a belief as to whether U.S.G. and National sell their said gypsum products within all of the states embraced within the Eastern area.

42. Denies each and all of the allegations of paragraph 42 of the complaint in so far as they relate to this defendant, and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of averments contained in paragraph 42 of the complaint in so far as they refer to companies or parties other than this defendant.

43. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 43 of said com-

plaint.

44. Denies each and all of the allegations of paragraph 44 of said complaint; and, without limiting the generality of the foregoing, denies that the defendants are, and have been for many years last past, parties to contracts in re-straint of trade and commerce in gypsum board, plaster and miscellaneous gypsum products among the several States, in violation of Section 1 of the Sherman Antitrust Act, that the defendants are, and have been for many years last past, actively engaged in a continuing combination and conspiracy in restraint of trade and commerce in said gypsum products among the several States, in violation of Section 1 of the Sherman Antitrust Act, that the defendants are monopolizing, and have monopolized for many years last past, trade and commerce in said gypsum products among the several States in violation of Section 2 of the Sherman Antitrust Act; that the defendants are, and have been for many years last past, attempting to monopolize trade and commerce in said gypsum products among the several States and are, and have been for many years last past, actively engaged in a continuing combination and conspiracy to monopolize trade and commerce in said gypsum products among the several States, in violation of Section 2 of the Sherman Antitrust Act, that the defendants are, and have been for many years last past, parties to contracts in restraint of trade and commerce in said gypsum products between the States and the District of Columbia, in violation of Section 3 of the Sherman Antitrust Act, and that the defendants are, and have been for many years last past, actively engaged in a continuing combination and conspiracy in restraint of trade and commerce in said gypsum products between the States and the District of Columbia, in violation of Section 3 of the Sherman Antitrust Act.

45. Denies each and all of the allegations contained in paragraph 45 of said complaint; and, without limiting the generality of the foregoing, denies (a) the formation, maintenance, consummation and existence of the combina-

tion described in said paragraph 45, and (b) that the defendant companies have entered into, have car-261 ried out or are carrying out any combination for the purpose and with the effect of restraining, dominating and controlling the manufacture and distribution of gypsum products in the Eastern area, either by the means set forth in subdivision (a) to (e) inclusive, of said paragraph 45, or otherwise; and further denies:

(a) that the defendant companies have concertedly raised and fixed at arbitrary and non-competitive levels the prices of gypsum board manufactured and sold by the defendant companies in the Eastern area;

(b) that the defendant companies have concertedly standardized gypsum board and its method of production by limiting the manufacture of gypsum board to uniform methods and by producing only uniform kinds of gypsum board for distribution in the Eastern area;

(c) that the defendant companies have concertedly raised, maintained and stabilized the general level of prices for plaster and miscellaneous gypsum products manufactured and sold by the defendant companies

in the Eastern area;

(d) that the defendant companies have concertedly refrained from distributing gypsum board, plaster and miscellaneous gypsum products manufactured by said companies through jobbers in the Eastern area;

(e) that the defendant companies have concertedly refused to sell said products to jobbers at prices below the prices of said defendant companies to dealers; and.

(f) that the defendant companies have concertedly induced and coerced manufacturing distributors to resell, at the prices raised and fixed by the defendant companies, gypsum board purchased from the defend-

ant companies.

46. Denies each and all of the allegations of paragraph 46 of said complaint. Further answering this defendant avers that it was organized in 1935 and that upon its organization it acquired the assets and business of The Celotex Company, its predecessor, which was organized about 1922; avers that until 1937 neither this defendant nor its predecessor had ever been engaged, directly or indirectly, in the gypsum business or had any relationship with any of the defendants in this cause with respect to the carrying on and conduct of the gypsum business. In 1937,

this defendant entered into negotiations looking towards the acquisition by it of certain shares of capital stock of Certain-teed and these negotiations ultimately culminated in the acquisition in 1938 by this

defendant of a minority stock interest in Certain-teed. Following such acquisition, this defendant carried on negotiations with Certain-teed looking towards the consummation of an arrangement whereby this corporation should be entitled to manufacture or have manufactured in the surplus manufacturing facilities of Certain-teed roofing and gypsum products. As a result of these and other negotiations, in the Fall of 1938 this defendant started in a limited way the sale of gypsum products manufactured in the plants of Certain-teed and in 1939 this defendant completed arrangements for marketing gypsum products manufactured in the plants of Certain-teed other than gypsum board and Jath in the territories logically served by the plants of Certain-teed producing the same, and started the sale as agent of Certain-teed and for and in its behalf of gypsum wallboard and gypsum lath in certain territories logically served by plants of Certain-teed. In 1939, this defendant acquired all of the assets of American. At the time of such acquisition, American was a licensee of U.S.Ct under the license agreement mentioned in paragraph \$5 of the complaint in this cause. Under the terms of said license agreement, American was obligated to pay U.S.G. large sums of money, and it was made a condition of such license agreement that American would not sell or dispose of all or substantially all of its assets without requiring the purchaser to assume and agree to be bound by all the terms, conditions and provisions of said license agreement. At the time of the acquisition by this defendant of the assets of American in 1939, this defendant was advised by counsel that this defendant could not engage in the manufacturing, distribution and sale of gypsum board and gypsum lath, which would have public acceptance and be competitive with the gypsum wallboard and gypsum lath generally sold throughout the United States, without infringing on some one or more of the many patents of U.S.G. covered by such license agreement, that American had acknowledged the validity of such patents under the terms of said license agreement,

and that it was obligatory upon this defendant in connection with the acquisition of said assets of American to take over and assume said license agreement and to observe the terms and conditions thereof.

This defendant was further advised that said license agreement was a valid obligation and was lawful, and this defendant in good faith and in an honest and sincere belief that it was obliged to assume the terms and provisions of said license agreement and carry out its terms if it engaged in the gypsum business and that all of the terms and provisions of said license agreement were valid and lawful and did not violate any of the laws of the United

States or the several states thereof, including the so-called Anti-Trust laws, this defendant has since 1939 faithfully and to the best of its ability observed the terms and provisions of said license agreement according to its terms, and has not engaged in any practices contrary to the provisions of said agreement and has not had any private, secret or other understandings or agreements with U.S.G., and its sole and only agreements, arrangements or understandings with U.S.G. have been said written agreement above referred to.

This defendant denies each and all of the allegations of said paragraph 46 of said complaint not herein expressly

admitted.

47. Denies each and all of the allegations of paragraph

47 of said complaint.

48. Admits the allegations of paragraph 48 of said complaint (except that this defendant does not by this paragraph of this answer make any admission as to the scope, validity or effect of said Utzman patent) and adopts the use of the terms "closed-edge board" and "open-edge board" therein set forth.

49. Admits the allegations of paragraph 49 of said com-

plaint.

50. Admits the allegations of paragraph 50 of said complaint.

51. Admits the allegations of paragraph 51 of said com-

plaint.

 Admits the allegations of paragraph 52 of said complaint.

53. Admits the allegations of paragraph 53 of said complaint.

54. Denies each and all of the allegations of paragraph 54 of said complaint, except that this defendant admits that the period from the latter part of 1925, after U.S.G. had obtained the judgment against Beaver referred to in paragraph 51 of said complaint and after the filing of the infringement suits by U.S.G. against American and the Universal Gypsum & Lime Company referred to in paragraph 53 of said complaint, until the year 1930, was marked by efforts of the parties thereto to settle said litigation.

55. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 55 of said complaint.

the allegations of paragraph 55 of said complaint.
56. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 56 of said complaint.

57. Avers that this defendant is without knowledge or

information sufficient to form a belief as to the truth of

the allegations of paragraph 57 of said complaint.

58. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 58 of said complaint.

59. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of

the averments of paragraph 59 of said complaint.

60. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 60 of said complaint.

61. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations

of paragraph 61 of said complaint.

62. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 62 of said complaint.

63. This defendant is without knowledge or information sufficient to form a belief as to the truth of the

· allegations of paragraph 63 of said complaint.

265 64. This defendant is without knowledge or information sufficient to form a belief as to the truth of

the allegations of paragraph 64 of said complaint.

65: This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 65 of said complaint.

66. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 66 of said complaint.

67. This defendant is without knowledge or information sufficient to form a belief as to the truth of the alle-

gations of paragraph 67 of said complaint.

68. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 68 of said complaint.

69. This defendant is without knowledge or information sufficient to form a belief as to the truth of the alle-

gations of paragraph 69 of said complaint.

70. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 70 of the complaint.

71. Admits the allegations of paragraph 71 of said com-

plaint.

72. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 72 of the complaint.

73. This defendant is without knowledge or information

sufficient to form a belief as to the truth of the allegations

of paragraph 73 of the complaint.

74. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 74 of said complaint.

75. This defendant is without knowledge or information sufficient to form a belief as to the truth of the alle-

gations of paragraph 75 of the complaint.

76. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations

of paragraph 76 of said complaint.

266 77. Denies, in so far as the same relate to (if at all) this defendant or American or the conduct of either of them, each and all of the allegations of paragraph 77 of said complaint; and, without limiting the generality of the foregoing, denies, in so far as the same relate to (if at all) this defendant or American or the conduct of either of them, that U.S.G. and its licensees mutually agreed among themselves as follows:

(a) that said companies would immediately discontinue the manufacture of unpatented open-edge board and second grade closed-edge board and would dispose of inventories of said boards at prices to be determined and fixed by U.S.G. and that, after disposal of said inventories, all companies would manufacture and sell a closed-edge board manufactured and bundled by the processes and methods used by U.S.G.;

(b) that U.S.G. would advance and stabilize the prices for board immediately after the execution of said license agreements and that, as prices for board were increased, all companies would increase their prices for plaster and miscellaneous gypsum products;

and/or

(c) that U.S.G. would continue to control, through the use of other patents, the price of its licensees for board manufactured by said licensees after the expira-

tion of the Utzman patent in August, 1929;

and avers that this defendant was in no manner engaged in the gypsum business until 1939 and that it did not at any time enter into any agreement, understanding or undertaking with U.S.G. or with any one or more of the other licensees of U.S.G. with respect to the subject matter of said paragraph 77. Further answering this defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 77 of said complaint except in so far as it has in this paragraph of this answer admitted, qualified or denied such allegations.

78. This defendant admits that during the period from June 1, 1929 to October 1, 1929, U.S.G. had pending certain applications in the U.S. Patent Office purporting to cover board manufactured through the use of the so-called "foam process," hereinafter sometimes called "Foam

Board" but avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allega-

tions of paragraph 78 of said complaint.

79. Admits that the foam process may be generally described as consisting of the introduction of foam into the slurry as an aggregate to cause the formation of numerous air voids in the board, and that said process requires that the numerous minute bubbles in the foam be sufficiently stable and pliable to resist collapse during the process of manufacturing board; and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 79 of said complaint with respect to whether, at the time U.S.G. offered said foam board license to this defendant or to other licensees of U.S.G., U.S.G. contemplated for the purpose of obtaining stability and pliability in the bubbles. the use of several methods, including among others, the use of a colloidal agent such as farinaceous paste to reinforce the walls of the bubbles.

80. Admits that, at the time U.S.G. offered such foam board licenses, Universal Gypsum & Lime Company owned United States Letters Patent No. 1,230,297 issued to Charles E. Hite on June 17, 1917 and United States Letters Patent No. 1,500,452 issued to Joseph F. Haggerty on July 8, 1924, that a true and correct copy of said Hite patent is set forth as Exhibit No. 4 in the appendix to said complaint, and that a true and correct copy of the Haggerty patent is set forth as Exhibit No. 5 in the appendix to said complaint; but avers that the summaries of the claims of said Hite and Haggerty patents contained in said paragraph 80 are incomplete and inadequate and as this de-

fendant is presently advised are inaccurate.

81. Avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of

paragraph 81 of said complaint.

82. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 82 of said complaint except that this defendant denies that U.S.G. ever advised or communicated with

this defendant concerning any of the matters referred to in

said paragraph.

83. Admits that U.S.G. agreed to purchase the 268 Hite and Haggerty patents from Universal Gypsum & Lime Company, that U.S.G. did acquire said patents from Universal Gypsum & Lime Company, and that American agreed to accept a license from U.S.G. covering said patents and the patent applications for said foam board; denies that this defendant at any time entered into any agreement, undertaking or understanding with any other licensee or licensees of U.S.G. with respect to the acceptance by this defendant or by such other licensees of a license from U.S.G. covering said patents and patent applications or with respect to U.S.G. acquiring said Haggerty and Hite patents; and avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 83 of said complaint.

84. Except to the extent that such allegations are hereinafter in this paragraph specifically admitted, denies each and all of the allegations of paragraph 84 of said complaint; admits that U.S.G. agreed with the Receivers for Universal to acquire, and did acquire, said Hite and

Haggerty patents.

.85. Admits that, following the acquisition of the Hite and Haggerty patents by U.S.G. from Universal Gypsum & Lime Company, American entered into a license agreement with U.S.G., and that this defendant acquired the rights of the licensee thereunder in 1939 but avers that said license contract was the first agreement entered into between American and U.S.G.; admits that said license agreement contained provisions of the character specified in subdivisions (a) to (h) inclusive of paragraph 85 of said complaint; avers that a duplicate original of said new license agreement between U.S.G. and this defendant was furnished to the Additional Grand Jury for the April, 1940, term of this Court in response to a subpoena duces tecum issued at the instance of the Attorney General of the United States, avers that said duplicate original of said license agreement is presently in the possession of . the Attorney General of the United States, and that said new

license agreement differs in certain particulars from 269 the agreement between U.S.G. and Ebsary set forth as Exhibit No. 6 in the appendix to said complaint; further admits that U.S.G. entered into similar agreements with National, Universal Gypsum & Lime Company, Atlantic Gypsum Company, Ebsary and Certain-teed; and further avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 85

of said complaint.

86. Denies that, American or this defendant at any time entered into any agreements or understandings with U.S.G. and its licensees, or with U.S.G., individually, or with any one or more of the licensees of U.S.G. of the kind and character specified in paragraph 86 of said complaint; and avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph 86, as

applied to U.S.G. and the other licensees of U.S.G.

87. Denies each and all of the allegations of paragraph 87 of said complaint, as amended, as aforesaid, in so far as the same purport to relate to the alleged agreement referred to in paragraph 86 of said complaint, or to any agreements of similar character; admits that, by virtue of the agreements referred to in paragraph 85 of said complaint, U.S.G., by 1930, was vested with the right to control the minimum prices of gypsum board manufactured by American but only to the extent that the manufacture of such board might be covered by one or more of the patents then owned by U.S.G., the use of which was licensed by the agreement with American referred to in said paragraph 85 and that such price control was to last by the terms of said agreements until a date 17 years after the date of issuance of patents not then issued; and denies that, by virtue of the agreements referred to in paragraph 85 of said complaint or by virtue of any agreements of the character specified in paragraph 86 of said complaint, all companies manufacturing and selling board in the Eastern area, except Texas, were obliged to manufacture a uniform, standardized board, or to manufacture a board falling within the scope of one or more of said patents; and further avers

that as to all other allegations of said paragraph 87 of said complaint this defendant is without knowledge or information sufficient to form a belief as to

the truth thereof.

88. Avers that, since this defendant acquired the rights of the licensee under said agreement between U.S.G. and American, referred to in paragraph 85 of said complaint, all gypsum board manufactured by this defendant has fallen within the scope of one or more of the patents owned by U.S.G. and which this defendant became licensed under said agreement upon acquiring the rights of American thereunder, to utilize in the manufacture of gypsum boards;

and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations of said paragraph.

89. Denies the formation, maintenance, consummation and existence of the combination referred to in paragraph 89 of said complaint, or of any combination of similar

character.

90. Admits that, throughout the period from the year 1939 to the date of the filing of said complaint, U.S.G. has determined and fixed the minimum selling prices and terms and conditions of sale of this defendant as its licensee for all gypsum board manufactured by this defendant as its licensee under patents owned by U.S.G. and which this defendant was licensed to utilize under the agreement described in paragraph 85 of said complaint; that throughout said period, this defendant has sold all gypsum board manufactured by it at the prices and on the terms and conditions of sale determined and fixed by U.S.G. as aforesaid; denies (a) that U.S.G. was or at any time became obligated so far as this defendant was concerned to raise and stabilize or to maintain the price of gypsum board under the license agreements referred to in paragraphs 76, 85 and 88 of said complaint, or any agreement or understanding collateral thereto, and (b) that U.S.G. has since 1932 maintained the prices of gypsum board at high, arbitrary and non-competitive levels: and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 90 of said complaint, as applied to the prices at and terms and conditions on which other licensees of U.S.G. have sold

gresum board manufactured by them, and as to all matters alleged in said paragraph 90 not herein expressly admitted, qualified or denied.

91. Admits that from time to time throughout the period from the date this defendant became a licensee in 1939, to the date of the filing of said complaint, U.S.G., has circulated among its licensees numerous bulletins setting forth the minimum selling prices and most favorable terms and conditions of sale for patented gypsum board, and that this defendant has adhered to said prices and terms and conditions of sale in the sale of board manufactured by it under said license agreement, and that certain of said bulletins are set forth as Exhibit 7 in the appendix to said complaint; but this defendant denies that subparagraphs (a) to (u) inclusive of paragraph 91 of said complaint accurately or sufficiently describe the contents of said bulletins; avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 91 of said complaint with respect to adherence by other licensees of U.S.G. to such prices and terms and conditions of sale; and further avers that adherence to such prices and terms and conditions of sale, either by this defendant or by any one or more of the other licensees of U.S.G., has never been the subject of any agreement, understanding or undertaking, either expressed or implied, between this defendant and any

one or more of such other licensees.

92. Admits that since 1939, U.S.G., through its officers, employees, attorneys and a corporation known as the Board Survey Company, has, in the exercise of the rights and privileges reserved to the licensor under the agreement between U.S.G. and American referred to in paragraph 85 of said complaint, which was acquired by this defendant as aforesaid, made periodic examinations of the records of this defendant relating to sales of gypsum board, and that this defendant has, in discharge of its obligation under said agreement so to do, made regular reports to U.S.G. of sales of gypsum board by this defendant; avers that this defendant has at no time endeavored to evade or avoid its obligations under said agreement, and, so far as this defendant is concerned, no occasion has arisen re-

quiring any action on the part of U.S.G. to enforce any of its rights, powers and privileges under said agreement; denies that this defendant has attended numerous meetings between U.S.G. and its licensees at which the prices and terms and conditions of sale prescribed by U.S.G. in said bulletins and at which complaints of violations by licensees of said bulletin prices were discussed; and further avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 92

of said complaint.

93. Denies that this defendant has entered into any agreement, understanding or undertaking, either expressed or implied, or has been a party to any concerted action with U.S.G. and any one or more licensees of U.S.G., relating to the scope of the patents referred to in paragraph 93 of said complaint or relating to the production or refraining from production of open-edge board or other board not falling within the scope of said patents; avers that this defendant has refrained from manufacturing and marketing open-edge board during such part of the period specified in said paragraph 93 as this defendant was engaged in the manufacture of gypsum board for the reason that

closed-edge board costs less to manufacture, primarily because of the elimination of spoilage, and is a more marketable product; and that this defendant has refrained from manufacturing and marketing other board not within the scope of said patents, for the reason that such other board would have constituted an inferior product, or a product not having public acceptance, which could not be marketed in competition with patented board; denies each and all of the allegations of the last sentence of said paragraph 93; and further avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 93 of said complaint.

94. Denies each and all of the allegations of paragraph

94 of said complaint.

95. This defendant admits that since 1939 and up to the date of filing said complaint, this defendant (in com-

pliance with bulletins issued by U.S.G.) has refused to sell patented board to jobbers at less than the

minimum dealer prices established by U.S.G., and that this defendant acting individually, and not in concert or pursuant to agreement, has refused to sell plaster and miscellaneous gypsum products to jobbers at less than the prevailing market prices to dealers for said products. This defendant is without knowledge or information with respect to the other matters mentioned in said paragraph 95 of said complaint sufficient to permit it to form a belief as to the

truth thereof.

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96. Denies each and all of the allegations of paragraph 96 of said complaint; and, without limiting the generality of the foregoing, denies that price control by U.S.G. of gypsum board manufactured by its licensees has been exercised at any time while this defendant has been engaged in the gypsum business or has been a licensee upon gypsum board of the licensees not covered by valid patents involved in the license agreements, and that, from time to time during said period, U.S.G. and its licensees have by concerted action controlled the prices and methods of distribution of plaster and miscellaneous gypsum products sold by U.S.G. and its licensees.

97. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations

of paragraph 97 of said complaint.

98. Admits that the first United States patent relating to foam board was issued on October 8, 1935, that the second patent relating to foam board was issued on May 4,

1937, that the third patent relating to foam board was issued on May 11, 1937, that copies of said patents, being United States Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009 are set forth as Exhibits Nos. 8, 9 and 10 in the appendix to said complaint; and further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 98 of said complaint not herein expressly admitted.

99. Avers that a true and correct copy of said Hite patent is set forth as Exhibit No. 4 in the appendix to said complaint, and that the summary of said patent set

forth in paragraph 99 of said complaint is incom-274 plete and inadequate and as this defendant is presently advised is inaccurate; and further avers that except as above stated this defendant is without knowledge or information sufficient to form a belief as to the truth

of the allegations of paragraph 99 of said complaint.

100. Avers that a true and correct copy of said Haggerty patent is set forth as Exhibit No. 5 in the appendix to said complaint, and that the summary of said patent set forth in paragraph 100 of said complaint is incomplete and inadequate and as this defendant is presently advised is inaccurate; and further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 100 of

said complaint, except as above stated.

101. Avers that, during the period from 1939 (the date this defendant became a licensee, as aforesaid, under the patents of U.S.G.) to the date of the filing of this complaint, all gypsum board and lath produced by this defendant fell within the scope of some one or more of the claims of the patents of U.S.G. covered by the terms of said license agreement, and denies that during said period none of the licensees of U.S.G. produced board which was covered by the Hite and Haggerty patents; and further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 101 of said complaint as applied to gypsum board manufactured by U.S.G. and other licensees of U.S.G. As to all of the allegations of said paragraph 101 of said complaint relating to transactions, happenings or eyents occurring prior to 1939, this defendant is without knowledge or information sufficient to form a belief as to the truth of such allegations.

102. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 102 of said complaint.

103. Denies all of the allegations of paragraph 103 of said complaint, except defendant admits that, acting individually and not as a licensee of U.S.G. and not in concert

or pursuant to agreement, this defendant has sold plaster and miscellaneous gypsum products on certain of the terms and conditions employed in the sale of gypsum board; and except that this defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 103 of said complaint in so far as the same apply to sales of

plaster and miscellaneous gypsum products by U.S.G. and its other licensees.

104. Denies each and all of the allegations of paragraph 104 of said complaint, except that this defendant admits that gypsum board is frequently transported in mixed cars or trucks with plaster and miscellaneous gypsum products.

105. Admits the allegations of paragraph 105 of said

complaint.

106. Denies each and all of the allegations of paragraph 106 of said complaint; and, without limiting the generality of the foregoing, denies that, when prices for plaster and miscellaneous gypsum products from time to time have advanced, this defendant has frequently permitted dealers to purchase said gypsum products at prices prevailing prior to the price advances, that such purchases have been made ostensibly under protected job contracts, but have involved material not actually covered by said contracts, and that this defendant has knowingly permitted dealers to make such purchases at such prices for the purpose of allowing such dealers a competitive concession.

107. Denies each and all of the allegations of paragraph

107 of said complaint.

108. Denies each and all of the allegations of paragraph 108 of said complaint; and, without limiting the generality of the foregoing, denies that, throughout the period from the year 1929 to the date of filing of said complaint, U.S.G. and its licensees have, by concerted action, induced and coerced manufacturing distributors purchasing gypsum board from U.S.G. and its licensees to resell said gypsum board to dealers and consumers at the bulletin prices determined and fixed by U.S.G. for sales of board by its licensees

to dealers and consumers, as referred to in paragraph 91 of said complaint; and further denies that this defendant has at any time controlled or attempted to control the prices charged by any manufacturing distributor (if any there be) to whom this defendant may have sold gypsum board or other gypsum products. 109. Denies each and all of the allegations of paragraph 109 of said complaint.

110. This defendant denies the allegations of paragraph

110 of said complaint.

111. Denies each and all of the allegations of the first sentence of paragraph 111 of said complaint; and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of the second sentence of said paragraph 111 of said com-

plaint.

112. Admits that U.S.G. and certain of its licensees have entered into separate license agreements covering the manufacture and sale of metallized board and perforated lath; but denies that said license agreements were entered into for the purpose of extending and strengthening the right to control minimum prices and terms and conditions of sale of gypsum products vested in U.S.G. under the basic license agreements referred to in paragraphs 85 and 88 of said complaint.

113. This defendant is without knowledge or information sufficient to form a belief as to the truth of the alle-

gations of paragraph 113 of said complaint.

114. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 114 of said complaint.

115. Admits the allegations of paragraph 115 of said

complaint.

116. Admits that the license agreements proposed by U.S.G. referred to in paragraph 115 of said complaint reserved to U.S.G. the right to determine and fix the minimum selling prices for perforated lath manufactured and sold by each of its licensees; but denies that U.S.G. agreed to fix such minimum prices of perforated lath at a differ-

ential above the price of straight lath.

277 117. Admits that The American Gypsum Company executed the license agreements offered by U.S.G., referred to in paragraph 115 of said complaint; but denies that this defendant assumed said license agreement of American with U.S.G.; and avers that this defendant is not and has not been a licensee under said perforated lath agreement and further avers that except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 117 of said complaint.

118. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allega-

tions of said paragraph 118.

119. Denies each and all of the allegations of paragraph 119 of said complaint except that it admits that American

was advised by patent counsel that the patent owned by U.S.G. covering perforated lath was of doubtful validity at least as to certain claims of said patent; and avers it is without knowledge or information sufficient to form a belief as to the allegations of said paragraph in so far as they relate to the other matters therein alleged; but avers that U.S.G., by virtue of the provisions of the basic license agreement referred to in paragraph 85 of said complaint, was authorized to determine and fix the minimum prices and terms and conditions of sale for perforated lath manufactured and sold by this defendant inasmuch as such board embodied other patented features within the scope of U.S.G. patents covered by said basic license agreement.

120. Admits that the validity of the patent referred to in paragraph 120 of said complaint has not been presented to or determined by any court of the United States, and that none of the licensees of U.S.G. has contested the validity of said patent and avers that the perforated lath manufactured by this defendant is different from that manufactured and sold by U.S.G. and further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations con-

tained in said paragraph.

121. Denies each and all of the allegations of

paragraph 121 of said complaint.

122. Denies the existence, operation and formation of the combination referred to in paragraph 122 of said complaint; denies that the prices referred to in said paragraph 122 are or have been non-competitive; admits that the prices of gypsum board during the period subsequent to the execution of the license agreements referred to in paragraph 85 of said complaint have been higher than those prevailing prior to the execution of said agreements; avers that, since the execution of said license agreements the minimum selling prices for gypsum board manufactured pursuant to said license agreements have been prescribed by U.S.G., in the exercise of the right and privilege so to do reserved to it as licensor under said agreements, that this defendant has no knowledge or information sufficient to form a belief as to the basis on which such prices have been from time to time established by U.S.G. and is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph 122 to the effect that said prices have failed to reflect substantial reductions in the manufacturing costs of U.S.G.; and further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 122 of said complaint to

the effect that each of the defendant companies has realized substantial profits in the manufacture and sale of gypsum board; and further avers that such profits, if any, as this defendant has from time to time realized as a result of the manufacture and sale of gypsum board have not been unreasonable or disproportionate to the cost of the investment by this defendant in the assets employed by it in its gypsum business.

123. Denies each and all of the allegations of paragraph 123 of said complaint, except that this defendant admits that this defendant, acting individually and not in concert or agreement, now distributes plaster and miscellaneous gypsum products on certain of the same terms and conditions of sale utilized by this defendant in the sale of its

gypsum board.

Further answering the allegations of said complaint, as to all of such allegations with respect to which this defendant in the foregoing numbered paragraphs of this Part I has averred that it is without knowledge or information sufficient to form a belief as to the truth of such allegations, this defendant demands that the plaintiff make strict proof thereof; and as to all other allegations of said complaint except such as are hereinbefore specifically admitted, this defendant denies each and all of such allegations, irrespective of whether the same have been heretofore specifically denied.

This defendant denies that it is or has been a party to any contract, agreement or understanding or to any combination or conspiracy in restraint of trade in violation of the provisions of Sections 1, 2 or 3 of the Sherman Antitrust Act, or in violation of any other provision of the Antitrust Laws of the United States, and, therefore, prays that the relief prayed for in the complaint be denied and further prays judgment that the complaint be dismissed

with costs to this defendant.

280 [Omitted)] 281 [Omitted.]

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ANDREW J. DALLSTREAM,

NORMAN WAITE,

Of Counsel,

231 South La Salle Street, Chicago, Illinois,

Dated July 31, 1941.

Service of copies of the Answers of Defendants, The Celotex Corporation and Bror G. Dahlberg, is hereby acknowledged this 31st day of July, 1941.

GEO. B. HADDOCK,

Attorney for Plaintiff.

283 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Answer of defendants National Gypsum Company and Melvin H. Baker

Filed Aug. 1, 1941

Now comes National Gypsum Company and Melvin H. Baker, hereinafter sometimes referred to as "these defendants," and for answer to the complaint herein as amended, admit, deny and allege as hereinafter set forth. For brevity and convenience in reference they adopt for purposes of this Answer the short names of the codefendants in this cause as used by the Plaintiff in the Complaint.

1. Admit that the complaint was filed and the proceedings instituted under Section 4 of the "Sherman Antitrust Act," but deny any violation or attempted violation, in any manner whatsoever, of Sections 1, 2 and 3 of said Act or either

or any of them.

2. Deny each and every allegation contained in paragraph 2 of the complaint, insofar as they relate to the defendant National, except that they allege that National is engaged in a continuous course of selling and delivering gypsum products, including gypsum board and plaster, to dealers within the District of Columbia, and is engaged in soliciting through salesmen orders for gypsum products from dealers within the District of Columbia and in promoting the sale of gypsum products in the District of Columbia by advertising and by distributing price lists, bulletins and circulars among dealers within said District.

These defendants further allege that they are without knowledge or information sufficient to form abelief as to the truth of the allegations contained in said paragraph 2, insofar as they relate to the defendant

companies other than National. .

3. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allega-

tions contained in paragraph 3 of the complaint.

4. Deny each and every allegation contained in paragraph 4 of the complaint and further deny that these defendants, or either of them, ever entered into, or in any manner became a party to, any agreement, combination, conspiracy or monopoly, of any kind whatsoever, in violation of the Antitrust laws or any other laws of the United States, whether in the District of Columbia or elsewhere and that they have performed acts in furtherance of any combination, conspiracy or monopoly within the District of Columbia or elsewhere.

5. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allega-

tions contained in paragraph 5 of the complaint.

6. Admit the allegations contained in paragraph 6 of

the complaint..

7. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 7, 8, 9, 10 and 11 of the complaint.

8. Adopt the designation "defendant companies" set forth in paragraph 12 for the companies described in para-

graphs 5 to 11, inclusive, of the complaint.

9. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 13 and 14 of the complaint.

10. Admit the allegations contained in paragraph 15

of the complaint.

11. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 16, 17, 18 and 19 of the

complaint.

12. Deny each and every allegation contained in paragraph 20 of the complaint, as amended, insofar as the defendant, National, is concerned, except that they admit that the defendant, National, is engaged in the manufacture of gypsum products, principally gypsum board and gypsum

of gypsum products, principally gypsum board and gypsum plaster, at plants located throughout the United States and allege that said defendant sells said products to dealers within the States east of the Rocky Mountains and in commerce between the States and the District of Columbia to dealers within the District of Columbia. These defendants further allege that they are without knowledge or information sufficient to form a belief

as to the truth of the allegations contained in said paragraph relating to the defendant companies other than National, and to the percentage of gypsum board and gypsum plaster sold in the Eastern area and adopt the definition of "Eastern area" set forth in said paragraph 20.

13. Admit the allegations contained in paragraph 21 of the complaint, but allege that such allegations are incom-

plete, inadequate, and too general.

14. Admit the allegations contained in the first and second sentences of paragraph 22 of the complaint and allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the third sentence of said paragraph.

15. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 23, 24 and 25 of the

complaint.

16. Deny the allegations contained in paragraph 26 of the complaint, except that these defendants allege that all gypsum board consists of a flat, thin core, which is a mixture of gypsum and certain other ingredients, covered on both sides with heavy paper, known as liners.

17. Admit the allegations contained in paragraph 27

of the complaint.

18. Admit the allegations contained in the first two sentences of paragraph 28, except that they allege that the manufacture of plaster is inaccurately described and that it is simple and inexpensive only in contrast to the more complicated and expensive manufacture of gypsum board. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the third sentence of said paragraph.

19. Admit the allegations contained in paragraph 29 of the complaint, except that they allege that the description of the manufacture of gypsum board contained therein is inaccurate and inadequate. These defendants further allege that the defendant, National, at no time used sawdust as an aggregate, but at all times in addition to patents licensed from U. S. G. used a patented process of its own not used by other manufacturers, which enabled said de-

fendant, National, to lay claim to the production of a gypsum board which was lighter and stronger

than competitive gypsum board.

20. Adopt the definitions set forth in paragraph 30 of the complaint.

21. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 31 and 32 of the complaint, as amended, except that they admit that U. S. G. has expanded into fields of other allied building materials.

22. Admit the allegations contained in paragraphs 33 and 34 of the complaint, as amended. These defendants further allege that of the ten gypsum plants which the defendant, National, operates in the Eastern area, eight

produce gypsum board.

23. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs 35, 36, 37 and 38 of the

complaint, as amended.

24. Deny the allegations contained in paragraph 39 of the complaint insofar as they relate to the defendant, National. Allege that a substantial part of the gypsum board and plaster manufactured by said defendant is sold in intrastate commerce; that National, from the inception of its business in 1925, adopted a policy of selling gypsum board only to the retail lumber dealers and that consequently at all times it has refrained from selling directly to contractors. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph insofar as they relate to persons, firms or corporations other than National.

25. Admit the allegations contained in paragraph 40 of the complaint, insofar as they relate to the defendant, National, except that they allege that the defendant, National, has only one warehouse for gypsum products in the Eastern area and further allege that said defendant makes frequent straight carload or truckload shipments of board. These defendants further allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph, insofar as they relate to defendant companies other than National.

26. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 41 of the complaint except that they allege that since 1936 the defendant, National, has sold gypsum products to retail dealers within all of

the States embraced within the Eastern area.

27. Deny each and every allegation of paragraph

288 27. Deny each and every allegation of paragraph 42 of the complaint, insofar as they relate to the defendant, National, except that they allege that National

has made infrequent sales of gypsum board at a discount to manufacturing distributors, which sales in any year have amounted to less than 1% of its total board sales for such year. Further allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph, insofar as they relate to persons, firms or corporations other than National.

28. Deny each and every allegation contained in paragraph 43 of the complaint, insofar as they refer to the defendant, National, and allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph, insofar as they refer to defendant companies other than National, to resales of board made by jobbers, or to the

business of said jobbers.

29. Deny each and every allegation contained in para-

graphs 44, 45 and 46 of the complaint.

30. Deny each and every allegation contained in paragraph 47 of the complaint and allege that these defendants have never entered into any combination in violation of the Antitrust acts, either at the time set forth in said paragraph 47 or at any other time.

31. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 48, 49, 50, 51, 52 and 53 of

the complaint.

32. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 54 of the complaint concerning settlement of the patent litigation referred to therein and deny each and every other allegation contained therein.

33. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 55, 56, 57, 58 and 59 of the

complaint.

34. Deny each and every allegation contained in para-

graph 60 of the complaint.

35. Deny each and every allegation contained in paragraph 61 of the complaint, insofar as they are intended to refer to the defendant, National. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 61 of the complaint, insofar as they relate to companies other

than National.

289 36. Deny each and every allegation contained in paragraph 62 of the complaint, insofar as they refer to the defendant, National. Further answering the alle-

gations of paragraph 62 of the complaint, allege that they are without knowledge or information sufficient to form a belief as to the truth thereof, insofar as they refer to com-

panies other than National.

37. Deny each and every allegation of paragraph 63 of the complaint, insofar as they are intended to refer to the defendant, National, and allege that they are without knowledge or information sufficient to form a belief as to the truth of said allegations, insofar as they refer to com-

panies other than National.

38. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 64 of the complaint, except that they admit that under date of September 17, 1926, a license agreement was entered into between U. S. G. and Universal, which agreement was substantially in the form of the Beaver agreement, set forth as Exhibit No. 2 of

the complaint.

39. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 65 of the complaint, except that they admit that on March 5, 1927, a license agreement was entered into between U. S. G. and Atlantic, which agreement was substantially the same as the Beaver agreement, set forth as Exhibit No. 2 of the complaint, and the Universal agreement, except that the Atlantic agreement contained no provision for damages.

40. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allega-

tions contained in paragraph 66 of the complaint.

41. Deny each and every allegation contained in paragraph 67 of the complaint, except that they allege that the period referred to in said complaint was marked by severe competition in the board industry, which resulted in decreasing the selling price of board, and except that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph, insofar as they relate to companies other than National.

42. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 68 of the complaint.

43. Allege that they are without knowledge or informa-

tion sufficient to form a belief as to the truth of the allegations contained in paragraph 69 of the complaint except they further allege that the defendant, National, from the time it commenced production of gypsum

board, was manufacturing semi-open edge board and

that for a time it was marketing a second grade board to compete with second grade board manufactured by other manufacturers.

44. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 70, 71 and 72 of the com-

plaint.

45. Deny each and every allegation contained in paragraph 73 of the complaint, insofar as they refer to the defendant, National, and allege that defendant, National, reduced its prices from time to time during the year 1928 in order to meet competitive prices of other gypsum board which was being sold in the market and that by the year 1929 its prices for gypsum board were substantially below 1927 levels. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 73 of the complaint, insofar as they relate to manufacturers other than National.

46. Allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 74 of the com-

plaint.

47. Deny each and every allegation contained in paragraph 75 of the complaint, insofar as they relate to the defendant, National, except that they admit that the expiration late of the Utzman Patent was August, 1929. These defendants further allege that during the year 1929 prior to the execution by National of its license agreement, representatives of National and U.S.G. from time to time discussed terms of settlement of patent infringement suits. brought by U. S. G. against National and then pending in the United States District Court for the Western District of New York; that National negotiated all terms and conditions of its settlement and its license agreement solely with the representatives and attorneys of U.S.G. and that it at no time consulted with or had any agreements with any of the other defendant companies or their representatives other than U.S.G. regarding the terms, conditions or scope of its license agreement or the settlement of its infringement suits. Further allege that National did not rely upon or receive any inducements or favors from Avery or U. S. G. and that it made no agreements with any gypsum manufacturer other than U. S. G. to become a licensee. Further allege that market conditions as evidenced by the demands of its dealers and of the consuming public required a closed edge board, that its investigation had indicated to it that it could effect a substantial saving in manufacturing cost by the use of U.S.G. patents to manu-

facture closed edge board, and that the so-called 291 "bundling patents" included in the license agreement permitted the most efficient and economical method of bundling board which has as yet been developed. Further allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 75 of the complaint, insofar

as they relate to companies other than National.

48. Deny each and every allegation contained in paragraph 76 of the complaint and allege that on May 16, 1929, after prior conferences with representatives of U. S. G. concerning the form, terms and conditions of the agreement, the defendant, National, entered into a license agreement with U. S. G. substantially in the form of the Ebsary agreement attached as Exhibit No. 3 to the complaint, except that the agreement between U. S. G. and National contained provisions for the settlement of the claims of U. S. G. against National for damages on account of the infringement of certain of the U. S. G. patents pursuant to which National was required to pay to U. S. G. in the manner provided in said license agreement the aggregate approximate sum of \$180,000.

49. Deny each and every allegation contained in para-

graph 77 of the complaint.

50. Admit the allegations contained in the first sentence of paragraph 78 of the complaint. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the second sentence of said paragraph except that they admit that the foam process was covered by pending applications for United States patents. Deny each and every allegation contained in the third sentence of said paragraph and specifically deny that any such agreement or understanding existed. Further allege that the foam patents afforded a substantial improvement in the quality and a reduction in the cost of manufacturing gypsum board.

51. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 79 of the complaint, except they admit that in a general way the description of the

foam process is correct.

52. Admit the allegations contained in paragraph 80 of the complaint, except that they allege that the summaries of the Hite and Haggerty patents are incomplete and inaccurate. 53. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 81 of the complaint.

54. Deny each and every allegation contained in paragraph 82 of the complaint, insofar as they relate to the defendant, National, and allege that they are without knowledge or information sufficient to form a belief as to the truth thereof, insofar as such allega-

tions relate to companies other than National.

55. Deny each and every allegation contained in paragraph 83 of the complaint, insofar as they relate to the defendant, National. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 83 of the complaint, insofar as they relate to companies other than National.

56. Deny each and every allegation contained in paragraph 84 of the complaint, except that they allege that U. S. G. acquired the Hite and Haggerty patents subject to the rights of the defendant, National, and that National, entered into a new license agreement with U. S. G. Further allege that the Hite and Haggerty patents were essential to National in the manufacture of gypsum board and that without them it was impossible to secure satisfactory adhesion of paper to board in quantity production. That in addition to the superior product which resulted, the use of the Hite and Haggerty patents produced a substantial sav-

ing in manufacturing cost,

Further allege that National had been a defendant in a law suit brought by Universal, alleging infringement of the Haggerty patent then owned by Universal, which was in receivership, and that the United States District Court for the Western District of New York, on plaintiff's motion for a preliminary injunction in said suit, had restrained the defendant, National, from continu-ing the manufacture of board, except on condition that National post a bond in the sum of \$50,000 and make monthly reports of sales to said Court, which National did in order to continue its business. That on the advice of patent counsel National's operation constituted infringement of both the Hite and Haggerty patents. That National, from the time of its organization, had used every means available to avoid infringement of the Haggerty patent and after having tried many substitutes for starch. was unable to manufacture a satisfactory board without the use of starch or some other ingredient covered by the said patent. That said suit was settled and adjusted on

or about August 2, 1929, by an agreement providing that Universal would license National to manufacture its products under the Hite and Haggerty patents and that U.S.G. subsequently purchased said Hite and Haggerty patents subject to the right of National to use the same in the manufacture of its products. That thereafter National, by and with the consent and approval of the United States District Court for the Northern District of Illinois, Eastern Division, of the United States District Court for the Western District of New York, and of other district courts wherein receivership proceedings were pending against

Universal, entered into an agreement with Universal, dated November 5, 1929, whereby National 293 finally settled the aforesaid law suit with Universal by the payment of the sum of \$87,500 in cash with the further agreement to pay an amount equivalent to onehalf per cent of National's selling price of all board from the date of said agreement until the 8th day of July, 1941.

57. Deny each and every allegation contained in paragraph 85 of the complaint and allege that on October 17, 1929. National entered into a new license agreement with U. S. G. which cancelled and terminated the agreement. dated May 16, 1929, previously in effect. Further allege that said new license agreement did not take effect until U. S. G. received a conveyance of the Hite and Haggerty patents, which conveyance was subject to the approval of the United States District Court for the Northern District of Illinois, Eastern Division, and other district courts wherein receivership proceedings were pending against Universal, and which approval was subsequently obtained. Further allege that the license agreement of the defendant, National, was substantially the same as the Ebsary agreement, Exhibit No. 6 attached to the complaint, except that National's agreement set forth U. S. G.'s claims for damages by reason of the infringement hereinabove referred to, which claims had been liquidated at \$178,213.06, and provided for the payment thereof by an additional royalty amounting to one and one-half per cent of National's selling price of board, until such royalty payments aggregated the sum of \$173,644.95, which sum still remained unpaid under said settlement.

58. Deny each and every allegation contained in paragraph 86 of the complaint insofar as they relate to the defendant, National, and allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph insofar as

they relate to companies other than National.

59. Deny each and every allegation contained in paragraph 87 of the complaint, and allege that sales of gypsum board by the defendant, National, in the Eastern area amounted to approximately \$1,500,000 in 1929. Further allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph relating to sales by other defendants, and that under the license agreement between U. S. G. and National, U. S. G. had the right to prescribe the licensee's minimum selling prices for all board manufactured by the licensee under the patents described in said agreement for the period also described therein.

60. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 88 of the complaint.

except that they admit that the license agreement of the defendant, National, has been in effect continuously since the year 1929 and is now in effect.

61. Deny each and every allegation contained in para-

graph 89 of the complaint.

62. Deny each and every allegation contained in paragraph 90 of the complaint, except that they admit that U.S. G. during the period referred to has fixed the minimum selling prices of each licensee for patented board manufactured and sold by such licensee and that the defendant, National, has observed said minimum prices in its sales of patented board manufactured by it under its said licenses, and further allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations referring to sales by defendant

companies other than National.

63. Admit that U. S. G. has circulated bulletins from time to time during the period referred to in paragraph 91 of the complaint, setting forth minimum prices and other terms and conditions to which the defendant, National, has adhered in its sale of patented gypsum board manufactured by it under its said license agreement with U. S. G. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations relating to adherence to such prices and terms by other licensees. Admit that Exhibit No. 7 of the complaint sets forth copies of forms of such bulletins but deny that the complaint accurately describes such bulletins. Except as hereinbefore specifically admitted or denied, these defendants deny each and every allegation contained in said paragraph.

64. Admit the allegations contained in the first and second sentences of paragraph 92 of the complaint and deny each and every other allegation contained in said paragraph, except that they allege that the defendant, National, has occasionally filed complaints of alleged violations by other licensees and has occasionally been the subject of similar complaints filed by other licensees. Further allege that meetings of U. S. G. and its licensees have been held infrequently at which matters of common interest relating to the license agreement and the bulletins have been discussed.

65. Deny each and every allegation contained in para-

graph 93 of the complaint.

66. Deny each and every allegation contained in paragraph 94 of the complaint.

67. Deny each and every allegation contained in para-

graph 95 of the complaint.

68. Deny each and every allegation contained in paragraphs 96 and 97 of the complaint.

295 69. Admit the allegations contained in the first and second sentences of paragraph 98 of the complaint. Deny each and every allegation contained in the third and fourth sentences of paragraph 98 of the complaint, insofar as they relate to the defendant, National, except that they admit that during the period referred to in said paragraph, U. S. G. fixed minimum prices for patented board embodying the claims of the Hite and Haggerty patents. Allege that from the time National commenced production in 1926 up to the time of filing the complaint it manufactured board falling within the scope of the Hite and Haggerty patents. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the third and fourth sentences of paragraph 98 of the complaint, insofar as they relate to companies other than National.

70. Deny each and every allegation contained in paragraph 99 of the complaint, insofar as they relate to the defendant, National, and allege that the first sentence of said paragraph sets forth an inadequate and inaccurate summary of the Hite patent and further allege that during the period referred to in said paragraph National manufactured board falling within the scope of the Hite patent. Further allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 99 of the complaint, insofar as they refer to licensees other than National.

71. Deny each and every allegation contained in paragraph 100 of the complaint, insofar as they relate to the defendant, National, and allege that the first sentence of said paragraph sets forth an inadequate and inaccurate summary of the Haggerty patent. Further allege that from the time National commenced production in 1926 up to the time of filing the complaint National used starch and other adhesives in the manufacture of board which were within the scope of the Haggerty patent. Further allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 100 of the complaint, insofar as they relate to licensees other than National.

72. Deny each and every allegation contained in paragraph 101 of the complaint, insofar as they relate to the defendant, National, and allege that during the period referred to in said paragraph National manufactured board covered by the foam patents and further allege that during all of said period the board produced by National was covered by the Hite and Haggerty patents. Further allege that they are without knowledge or information sufficient to form a belief as to the allegations contained in said paragraph, insofar as they relate to licensees other than Na-

tional.

296 73. Deny the allegations contained in the third sentence of paragraph 102 of the complaint. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first, second and fourth sentences of said paragraph.

74. Deny each and eyery allegation contained in para-

graph 103 of the complaint.

75. Deny each and every allegation contained in paragraph 104 of the complaint, except that they admit that gypsum board is frequently transported in mixed cars or trucks with other gypsum products.

76. Admit the allegations contained in paragraph 105 °

of the complaint.

77. Deny each and every allegation contained in paragraph 106 of the complaint, insofar as they relate to the defendant, National, and allege that National has permitted sales to dealers at prices prevailing prior to price advances only to the extent of material required for a specific job covered by a bona fide specific job contract. Further allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained

in said paragraph of the complaint, insofar as they relate to manufacturers other than National.

78. Deny each and every allegation contained in para-

graph 107 of the complaint.

79. Deny each and every allegation contained in paragraphs 108, 109, 110 and 111 of the complaint, except that they allege they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the last sentence of paragraph 111 of the complaint.

80. Deny each and every allegation contained in paragraph 112 of the complaint, insofar as they relate to the defendant, National, and allege that they are without knowledge or information sufficient to form a belief as to the truth of such allegations, insofar as they relate to licensees

other than National.

81. Deny each and every allegation contained in paragraph 113 of the complaint insofar as they relate to the defendant, National, and allege that in 1934 U. S. G. offered to National a metallized board license and that on October 5, 1934, National entered into such a license with U. S. G. substantially in the form of the Ebsary agreement, Exhibit No. 11 attached to the complaint. Further allege that a license under said patents afforded a means to manu-

facture a low cost insulation board and thereby increase the market for gypsum board and that National had previously carried on extensive research on such methods of insulation and that none were as satisfactory as that provided by the metallized board patents covered by said license. Further allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph insofar as they relate to licensees other than Na-

82. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 114 of the complaint, except that they allege that at the time National executed the metallized board license it intended to manufacture patented metallized board and did manufacture such board and that from the time of the execution of such agreement to the time of filing the complaint U. S. G. has fixed National's minimum prices for the sale of such patented metallized board manufactured by it pursuant to said license agreement.

83. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 115 of the complaint, ex-

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cept that they admit that in 1936 U.S.G. offered National a license to manufacture and sell perforated gypsum lath.

84. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 116, 117, 118, 119 and 120 of the complaint.

85. Deny each and every allegation contained in paragraphs 121, 122 and 123 of the complaint.

Wherefore, the defendants, National Gypsum Company and Melvin H. Baker, pray that the complaint be dismissed as to them at plaintiff's cost. Dated: July 30, 1941.

> Frederick A. Ballard, FREDERICK A. BALLARD.

American Security Bldg., Washington, D. C., Attorney for the defendants, National. Gypsum Company and Melvin H. Baker.

Elmer E. Finck, ELMER E. FINCK,

804 Liberty Bank Bldg., Buffalo, N. Y. .Counsel.

Received a copy of the foregoing answer this 1st day of August, 1941. GEO. B. HADDOCK,

> Special Assistant to the Attorney General. In the District Court of the United States for the District of Columbia

[Title omitted.)] [File endorsement omitted.]

> Answers of Defendants Certain-teed Products Corporation and Henry J. Hartley

Filed August 1, 1941

Now come the defendants, Certain-teed Products 299 Corporation and Henry J. Hartley, and, for answer to the complaint filed herein and the amendment to said complaint filed herein on June 5, 1941, severally admit, deny and aver, and otherwise make answer unto said complaint, as so amended, as hereinafter set forth.

## PART I

Answer of Defendant Certain-teed Products Corporation

For answer to said complaint, as amended, as aforesaid, with each of the numbered paragraphs of this Part I being in answer to the paragraph of said complaint bearing the same number, the defendant Certain-teed Products Corporation (hereinafter in this

Part I sometimes referred to as "this defendant") admits,

denies and avers as follows:

1. Admits that the complaint is filed and that these proceedings are instituted against the several defendants under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," said act being commonly known as the "Sherman Antitrust Act," but denies (a) that this defendant, either alone or in conjunction with one or more of the other defendants to this action or any other person or persons, firm or firms, corporation or corporations, whatsoever, has heretofore engaged or is now engaged in any action or course of action prohibited or declared illegal by Section 1, Section 2 or Section 3 of said Sherman Antitrust Act, or by any other provision of said Act, and (b) that the plaintiff is entitled, under Section 4 of said Sherman Antitrust Act, to the relief prayed for in said complaint.

2. Admits that this defendant transacts business in the District of Columbia, that it is engaged in a continuous course of business in selling and delivering gypsum products, including gypsum board and plaster, to dealers within the District of Columbia, that it is engaged in soliciting through salesmen orders for gypsum products from dealers within the District of Columbia and in promoting the sale of said gypsum products in the District of Columbia by advertising in the District of Columbia and by distributing price lists, bulletins and circulars among dealers within

the District of Columbia; denies that this defendant is engaged in selling and delivering gypsum products to consumers within the District of Columbia or in soliciting orders for gypsum products from consumers within the District of Columbia or in promoting the sale of gypsum products in the District of Columbia by distributing price lists, bulletins and circulars among consumers within the District of Columbia; and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 2 of said complaint in so far as the same refer to the other defendant companies.

3. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the

allegations of paragraph 3 of said complaint.

4. Denies (a) that this defendant is or has been a party to any unlawful combination, conspiracy or monopoly of the kind and character referred to in paragraph 4 of said complaint, (b) the formation, maintenance, operation and

existence of the specific combination, conspiracy and monopoly referred to in said paragraph 4, and (c) that this defendant has performed any acts, either within or without the District of Columbia, in furtherance of any such combination, conspiracy or monopoly.

5. Admits the allegations of paragraph 5 of said complaint and adopts the use of the phrase "U.S.G." therein

set forth.

6. Admits the allegations of paragraph 6 of said complaint and adopts the use of the word "National" therein set forth.

7. Admits the allegations of paragraph .7 of the said

complaint.

8. Admits the allegations of paragraph 8 of said complaint and adopts the use of the word "Celotex" therein set forth.

9. Admits the allegations of paragraph 9 of said complaint and adopts the use of the word "Ebsary" therein

set forth.

10. Admits the allegations of paragraph 10 of said complaint and adopts the use of the word "Newark" therein set forth.

11. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11 of said complaint, but this defendant adopts the use of the word "Texas" as therein set forth.

12. Adopts the definition of the term "defendant com-

panies" set forth in paragraph 12 of said complaint.

13. Admits the allegations of paragraph 13 of said complaint.

14. Admits the allegations of paragraph 14 of said

complaint.

15. Admits the allegations of paragraph 15 of said

complaint.

16. Admits that Bror Dahlberg, whose middle initial is "G" (not "H" as set forth in said complaint) is President of Celotex and Chairman of the Board of Directors of this defendant, and that his business address is 919 North Michigan Avenue, Chicago, Illinois.

17. Admits the allegations of paragraph 17 of said

complaint.

303 18. Admits the allegations of paragraph 18 of said complaint.

19. Admits the allegations of paragraph 19 of said complaint.

20. Adopts the definition of the term "Eastern area" set forth in paragraph 20 of said complaint, as amended, as aforesaid; admits that each of the defendant companies is engaged in the manufacture of gypsum products, principally gypsum board and gypsum plaster, at one or more plants located throughout the United States, that each of the defendant companies sells a portion of the gypsum products so manufactured in interstate commerce in some or all of the States comprised within the Eastern area, that each of the defendant companies, with the exception of Texas, sells a portion of such gypsum products in commerce between the States and the District of Columbia to retail dealers in building products within the District of Columbia, and that the defendant companies manufacture and sell approximately 100% of all gypsum board, but this defendant is without knowledge or information sufficient to form a belief as to whether said defendant companies manufacture and sell approximately 80% of all gypsum plaster currently manufactured and sold in the Eastern area; avers that this defendant owns and operates plants for the manufacture of gypsum products located at Akron, New York, Grand Rapids, Michigan, Fort Dodge, Iowa, Blue Rapids, Kansas, and Acme, Texas, that the sales of gypsum products made by this defendant in the Eastern area are comprised of sales to retail dealers in building

materials and sales to certain of the other defendant 304 companies, and that this defendant does not sell gypsum products to consumers within the Eastern area; assuming the term "distributors", as used in paragraph 20 of said complaint is intended to describe the various small manufacturers of calcined gypsum and plaster referred to in paragraph 42 of said complaint and specifically named in subdivision II of the Bill of Particulars heretofore filed by the plaintiff in these proceedings, further avers that the last sale of gypsum products made by this defendant to any of said distributors was consummated during the year 1939; and avers that this defendant has no knowledge or information sufficient to form a belief as to whether the other defendant companies sell gypsum products to consumers or to manufacturing distributors within said Eastern area.

21. Admits the allegations of paragraph 21 of said complaint with respect to the description of gypsum, except that said description is not complete; and avers that no commercial deposits of gypsum rock are 100% pure gypsum, but that the mineral, as mined, is mixed with varying amounts of limestone, sand, shale, anhydrite, and some-

times minute quantities of rock salt and organic matter, and that the production of calcined gypsum or stucco employed in the manufacture of gypsum products used in the building construction industry, including gypsum board and gypsum plaster, requires the utilization of certain processes in addition to crushing and heating, such as grading and sorting, the removal of impurities, and the addition, during the heating process, of various substances for the purpose of controlling the setting time and other characteristics of the resulting product.

22. Adopting the definition of the term "gypsum board" set forth in paragraph 30 of said complaint, 305 admits the allegations of the first two sentences of paragraph 22; but avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of the last sentence

of said paragraph 22.

23. Admits the allegations of paragraph 23 of said

complaint.

24. Admits the allegations of the first four sentences of paragraph 24 of said complaint; but avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of the

last two sentences of said paragraph 24.

25. Admits that several years after the first commercial manufacture of plasterboard, a gypsum board, known as "wallboard" and designed to be used as a finished panel in place of plaster and lath in wall and ceiling structures. was introduced on the market, that gypsum wallboard is now one of the most important of various boards on the market which are used as substitutes for plaster and lath; but avers that this defendant is without knowledge or information sufficient to form a belief as to whether the sales value of gypsum wallboard manufactured by the defendant companies and sold in the United States in 1939 was approximately \$8,500,000, or whether approximately 90% of such gypsum wallboard was sold in the Eastern area, or as to the extent of the use by the United States Government of gypsum wallboard during the World War of 1914-18 in temporary structures such as barracks; and denies that such use by the Government of the United States has operated greatly to stimulate the production of gypsum wallboard.

306 26. Admits the allegations of paragraph 26 of said complaint, except that the description of the products therein contained is neither accurate nor com-

plete.

27. Admits the allegations of paragraph 27 of said complaint; and avers that the use of perforated lath of the type and character manufactured and sold by this defendant since about the year 1936 operates to increase the fire resisting quality of the wall or ceiling structure in which

such perforated lath is used.

28. Admits that the manufacture of plaster from calcined gypsum involves the addition of various substances in varying amounts for the purpose of retarding or accelerating the setting time of the finished product and the addition of hair or fiber in varying amounts for the purpose of increasing the strength of the finished product, that the manufacture of gypsum board from calcined gypsum is a more complicated operation than the manufacture of gypsum plaster, that the manufacture of gypsum board requires expensive equipment and machinery, that substantially all gypsum calcining plants are equipped to manufacture gypsum plaster, and that gypsum calcining plants are not always equipped to manufacture gypsum board; denies that the manufacture of plaster from calcined gypsum involves a relatively simple operation; and avers that each of the gypsum plants of this defendant is equipped to produce and is producing gypsum plaster of many kinds, grades and qualities and possessing varying characteristics, dependent on the place at and the purpose for which the same is to be used and other considerations and that such manufacture involves a high degree of control of condi-

tions of manufacture, conformity to specifications and other factors, requiring a highly trained and skilled supervising and engineering personnel.

29. Admits that, in the manufacture of gypsum board, calcined gypsum is first mixed with water to form a thick plastic mass known as a slurry, that an adhesive to increase the bond between the core and the liners is mixed, either with the dry calcined gypsum or with the slurry, that to the slurry is added a so-called aggregate to lighten the weight of the finished board, that, until 1929, the most commonly used aggregate was sawdust, that, since 1929, the aggregate employed by this defendant has been composed in part of soap foam, which causes the formation of numerous minute voids in the board, and that, after the addition of the aggregate to the slurry, the mixture is spread upon the lower liner and the upper liner is placed upon the top. of the mixture; but defendant avers, however, that the description of said process contained in paragraph 29 of said complaint is inadequate in failing to set forth certain important aspects of said process such as, for example, (i)

the so-called aggregate presently used consists in part of sawdust, which is used to assist in decreasing the weight of the board and to impart thereto certain other desired characteristics, (ii) an accelerator, consisting of pulverized gypsum rock, potassium sulphate, zinc sulphate or other chemical is added to the dry calcined gypsum or to the slurry for the purpose of accelerating the setting and drying of the finished product and (iii) the setting and drying of the finished wallboard is completed after the same has been cut into proper lengths and is mechanically aided by the use of expensive drying equipment in which the

temperature is carefully controlled at all stages; further avers that the foam which is added to the

slurry in the manufacture of gypsum board by this defendant consists of a mixture of resin soap and casein solutions, that the addition of such foam produces microscopic air voids throughout the gypsum core, that, after the foam is added to the slurry, the casein reacts with the gypsum, forming insoluble gypsum caseinate which reinforces the void structure of the gypsum core, and that this foam is added to the slurry for the following reasons: (a) to increase thermal insulation, (b) to increase nailing properties, (c) to reduce the brittleness of the core, (d) to increase flexibility and (e) to lighten the weight of the board; and further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph 29, insofar as the same purport to constitute a description of the process or processes employed by the other defendant companies in the manufacture of gypsum board.

30. Adopts the definition of the terms, "plaster," "lath," "plasterboard," "wallboard," "gypsum board" and "board"

set forth in paragraph 30 of said complaint.

31. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of

the allegations of paragraph 31 of said complaint.

32. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 32 of said complaint, except that this defendant admits that since 1925 U.S.G. has ex-

panded into fields of other allied building materials and is now an important manufacturer of some of the materials enumerated in said paragraph 32.

. 33. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 33 of said complaint, as amended, except that this defendant admits that National

is the second largest producer of gypsum products in the United States.

34. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 34 of said complaint, except that this defendant admits that National has expanded into fields of other allied building materials and is now engaged in the production of some of the products enumerated in

said paragraph 34.

35. Admits that this defendant is the third largest producer of gypsum products in the United States, that in 1939, this defendant produced approximately 11% of all gypsum board and approximately 10% of all plaster manufactured and sold in the Eastern area, that sales of gypsum board by this defendant in the Eastern area during the year 1939 amounted to approximately \$2,100,000, that this defendant did not enter the gypsum industry until 1923 after it had become well established as an important producer of roofing materials, paints and varnishes and composition flooring, that, in 1923, this defendant entered the plaster business through the acquisition of six gypsum plants from Acme Cement Plaster Company, that this defendant did not commence the manufacture of gypsum board until 1926, that the manufacture of gypsum board

by this defendant during the year 1926 was confined to a single plant, that in 1928, this defendant acquired the assets of The Beaver Board Companies. a Delaware corporation, and The Beaver Products Company, Inc., a New York corporation, that, in the year 1928, said The Beaver Products Company, Inc. had been for many years an important producer of fiber wallboard, that said The Beaver Products Company, Inc. entered the gypsum industry in 1920 through the purchase of the six gypsum plants of American Cement Plaster Company, at four of which plants gypsum board was produced, and the single gypsum plant of Bestwall Manufacturing Company, which plant was also equipped to manufacture gypsum board, and that this defendant now operates five gypsum plants, at four of which gypsum board is produced; denies that, in 1923, or prior thereto, this defendant was an important producer of paper; and avers that this defendant is not presently engaged in the manufacture of paints and varnishes, that it has heretofore disposed of its composition flooring business to Sloane-Blabon Corporation, a Delaware corporation and a partially owned subsidiary of this defendant, and that this defendant is not now engaged in the manufacture of paper, except to the extent that it may be

deemed to be so engaged as a result of its indirect ownership of the capital stock of The Beaver Wood Fibre Com-

pany, Limited, an Ontario corporation.

36. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 36 of said complaint, as amended, as aforesaid, except that this defendant admits that Celotex, Ebsary and Texas are single plant operators.

37. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 37 of said complaint.

38. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of

the allegations of paragraph 38 of said complaint.

39. Admits that this defendant sells most of the gypsum board and plaster manufactured by it in interstate commerce and in commerce between the States and the District of Columbia to retail building material dealers located throughout the Eastern area, that said dealers resell said gypsum products principally to building contractors, and that, since 1929, this defendant has not sold gypsum produets directly to contractors; avers that this defendant is without knowledge or information sufficient to form a belief as to whether since 1929 the other defendant companies have not sold gypsum products directly to contractors; further avers that the discontinuance of or failure to make sales of gypsum products directly to contractors, whether on the part of this defendant or of the other defendant companies was not, and is not, the subject of any agreement, understanding or undertaking, either express or implied, between this defendant and any one or more of the other defendant companies; further avers that it is without knowledge or information sufficient to form a belief as to whether each of the other defendant companies sell most of the gypsum board and plaster manufactured by it in interstate commerce and in commerce between the States and the District of Columbia to retail building material dealers located throughout the Eastern area; and further

avers that only a small fraction of the gypsum 312 board manufactured by this defendant and by all of the defendant companies in the aggregate is sold in commerce between the States and the District of Columbia.

40. Admits that the gypsum products manufactured by the defendant are transported by truck or railroad to the yards of dealers usually from the plants in which the prod-

ucts are manufactured but sometimes from warehouses owned by this defendant, and admits that gypsum board is frequently transported in mixed cars or trucks of board, plaster and miscellaneous gypsum products; but avers that, while straight carload shipments of board are infrequent, straight truckload shipments of board are frequent; and further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 40 of said complaint so far as the same apply to other defendant companies.

41. Admits that this defendant sells its gypsum products to retail dealers within all of the states embraced within the Eastern area and that the other defendant companies sell gypsum products in some of the states within the Eastern area; but avers that this defendant is without knowledge or information sufficient to form a belief as to whether U.S.G. and National sell their said gypsum products within

all of the states embraced within the Eastern area.

42. Admits that this defendant has heretofore sold relatively small quantities of gypsum board manufactured by it to certain of the companies named in subdivision II of the Bill of Particulars heretofore filed by the plaintiff in

these proceedings as constituting the manufacturing distributors referred to in paragraph 42 of said com-

plaint, only a relatively small percentage of which sales were in interstate commerce, that said sales of gypsum board were made at a discount from this defendant's prices to dealers, that said gypsum board was resold by said manufacturing distributors to dealers in competition with this defendant and others of the defendant companies, and that said manufacturing distributors usually shipped said gypsum board in mixed cars or trucks made up of gypsum board aforesaid and of plaster produced by said manufacturing distributors; avers that this defendant has made no sales of gypsum board to any of the manufacturing distributors so named since some time in the year 1939, that, at no time, have sales to manufacturing distributors constituted a substantial portion of the production or sales of expoun board by this defendant, and that no portion of the gypsum board sold by the defendant to manufacturing distributors has been resold in the District of Columbia; but avers that this defendant is without knowledge or information sufficient to form a belief with respect to the truth of the allegations of paragraph 42 of said complaint, as applied to the other defendant companies, or to sales made by the other defendant companies to manufacturing distributors, or to resales of gypsum products by any such manufacturing distributors.

43. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 43 of said complaint, except that this defendant admits that prior to 1932 this defendant sold some board and plaster to building material jobbers at a discount from the price at which said products

were sold to dealers and that some of said jobbers 314 were also engaged in the manufacture of plaster, and that, since 1932, this defendant has not sold any substantial amounts of gypsum board or plaster to jobbers.

44. Denies each and all of the allegations of paragraph 44 of said complaint; and, without limiting the generality of the foregoing, denies that the defendants are, and have been for many years last past, parties to contracts in restraint of trade and commerce in gypsum board, plaster and miscellaneous gypsum products among the several States, in violation of Section 1 of the Sherman Antitrust Act, that the defendants are, and have been for many years last past, actively engaged in a continuing combination and conspiracy in restraint of trade and commerce in said gypsum products among the several States, in violation of Section 1 of the Sherman Antitrust Act, that the defendants are monopolizing, and have monopolized for many years last past, trade and commerce in said gypsum products among the several States in violation of Section 2 of the Sherman Antitrust Act, that the defendants are, and have been for many years last past, attempting to monopolize trade and commerce in said gypsum products among the several States and are, and have been for many years last past, actively engaged in a continuing combination and conspiracy to monopolize trade and commerce in said gypsum products among the several States, in violation of Section 2 of the Sherman Antitrust Act, that the defendants are, and have been for many years last past, parties to contracts in restraint of trade and commerce in said gypsum products between the States and the District of Columbia, in violation of Section 3 of the Sherman Anti-

trust Act, and that the defendants are, and have been 315 for many years last past, actively engaged in a continuing combination and conspiracy in restraint of trade and commerce in said gypsum products between the States and the District of Columbia, in violation of Section 3 of the Sherman Antitrust Act.

45. Denies each and all of the allegations contained in paragraph 45 of said complaint; and, without limiting the generality of the foregoing, denies (a) the formation, maintenance, consummation and existence of the combination described in said paragraph 45, and (b) that the defendant

companies have entered into, have carried out or are carrying out any combination for the purpose and with the effect of restraining, dominating and controlling the manufacture and distribution of gypsum products in the Eastern area, either by the means set forth in subdivisions (a) to (e) inclusive, of said paragraph 45, or otherwise; and further denies:

(a) that the defendant companies have concertedly raised and fixed at arbitrary and non-competitive levels the prices of gypsum board manufactured and sold by

the defendant companies in the Eastern area;

(b) that the defendant companies have concertedly standardized gypsum board and its method of production by limiting the manufacture of gypsum board to uniform methods and by producing only uniform kinds of gypsum board for distribution in the Eastern area;

(c) that the defendant companies have concertedly raised, maintained and stabilized the general level of prices for plaster and miscellaneous gypsum products manufactured and sold by the defendant companies in the Eastern

area;

(d) that the defendant companies have concertedly refrained from distributing gypsum board, plaster and miscellaneous gypsum products manufactured by said companies through jobbers in the Eastern

area;

(e) that the defendant companies have concertedly refused to sell said products to jobbers at prices below the prices of said defendant companies to dealers; and (f) that the defendant companies have concertedly induced and coerced manufacturing distributors to resell, at the prices raised and fixed by the defendant companies, gypsum board purchased from the defendant companies.

46. Denies each and all of the allegations of paragraph 46 of said complaint, except that this defendant avers that U.S.G., as licensor, and this defendant, as licensee, have on various dates entered into the various license agreements referred to in paragraphs 76, 85, 113 and 117 of said complaint; without limiting the generality of the foregoing denial, further denies that said license agreements were made or entered into by this defendant for any of the purposes described in paragraphs 44, 45 and 46 of said complaint and avers that each of said license agreements was voluntarily and in good faith entered into and made by this defendant for the wholly lawful purpose of enabling this defendant to engage in the manufacture, sale and distribution of the gypsum products covered by one or more of the claims of all or certain of the United States Letters

Patent owned by U.S.G. and more particularly described and referred to in said respective license agreements.

47. Denies each and all of the allegations of paragraph

47 of said complaint.

48. Admits the allegations of paragraph 48 of said complaint and adopts the use of the terms "closed-edge board" and "open-edge board" therein set forth.

49. Admits the allegations of paragraph 49 of said com-

plaint.

50. Admits the allegations of paragraph 50 of said com-

plaint.

51. Admits the allegations of paragraph 51 of said complaint.

52. Admits the allegations of paragraph 52 of said com-

plaint.

53. Admits the allegations of paragraph 53 of said com-

plaint.

54. Denies each and all of the allegations of paragraph 54 of said complaint, except that this defendant admits that the period from the latter part of 1925, after U.S.G. had obtained the judgment against Beaver referred to in paragraph 51 of said complaint and after the filing of the infringement suits by U.S.G. against American Gypsum Company and the Universal Gypsum & Lime Company referred to in paragraph 53 of said complaint, until the year 1930, was marked by efforts of the parties thereto to settle said litigation.

55. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the

allegations of paragraph 55 of said complaint.

56. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 56 of said complaint.

57. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of

the allegations of paragraph 57 of said complaint.

58. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 58 of said com-

plaint.

59. Admits that some time in May, 1926 a meeting was held between representatives of U.S.G. and this defendant regarding the execution of a license agreement between U.S.G., as licensor, and this defendant, as licensee, under which this defendant would be authorized to manufacture and sell closed-edge board covered by the claims of the Utzman patent referred to in paragraph 48 and other

portions of said complaint, and that at said meeting there were present representatives of some other manufacturers of gypsum products who were conducting similar negotiations with U.S.G.; but denies each and all of the other

allegations of paragraph 59 of said complaint.

60. Denies each and all of the allegations of paragraph 60 of said complaint, except that this defendant admits that in May, 1926 this defendant expressed to representatives of U.S.G. a willingness to consider becoming a licensee under the Utzman patent, provided a mutually satisfactory contract could be agreed upon; but avers that the willingness of this defendant to enter into such a license agreement was not conditioned upon or motivated or influenced by any similar agreement on the part of any other manufacturer or group of manufacturers of gypsum board, and that this defendant at no time entered into any agreement or understanding with any other manufacturer or group of manufacturers, either written or oral, expressed or implied, relating to the execution by this defendant or any such other manufacturer of any license agreement with U.S.G.

319 61. Denies each and all of the allegations of paragraph 61 of said complaint, except that this defendant admits that a draft of a license agreement containing, among others, the terms and provisions generally referred to in paragraph 61 was submitted by U.S.G. to this de-

fendant.

62. Admits that this defendant objected to the form of license agreement submitted to it by U.S.G., as alleged in paragraph 61 of said complaint; denies that this defendant urged as an objection to the form of said license agreement, or otherwise, that, if royalties were to be paid until 1937, control of licensees' prices by U.S.G. should not cease in 1929; and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 62 of said complaint, as applied to other members of the gypsum industry or the negotiations between U.S.G. and such members.

63. Denies that this defendant made any proposal to U.S.G, or to Sewell Avery to the effect that the license agreement cover only the Utzman patent and run only until the expiration of said patent; and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 63 of said complaint, as applied to the other companies therein referred to or the disposition by U.S.G. or Avery of any counter-proposals which may have been made by such

companies.

64. Admits that, between July and September, 1926, The Beaver Products Company, Inc. became licensee of U.S.G. under the Utzman patent for the purpose, inter alia, of funding the liability evidenced by the

of funding the liability evidenced by the judgment theretofore obtained by U.S.G. against said The Beaver Products Company, Inc., as alleged in paragraph 61 of said complaint, and that, on July 29. 1926, U.S.G. and said The Beaver Products Company, Inc. entered into an agreement compromising the litigation aforesaid and into the license agreement, a copy of which is set forth as Exhibit No. 2 in the appendix to said complaint; avers that Universal Gypsum & Lime Company was not a party to the aforesaid agreements or to the negotiations preceding the execution thereof, and that this defendant was not a party to any agreements of similar character between U.S.G. and said Universal Gypsum & Lime Company or to the negotiations, if any, preceding the execution thereof; and further avers that, except as above set forth, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph 64.

65. Denies that, during the fall of 1926 and the spring of 1927, negotiations between this defendant and U.S.G. with respect to the grant by U.S.G. to this defendant of a license under the Utzman patent were continued, and that this defendant attended any meetings or conferences held during said period to induce members of the industry to accept licenses; and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations of paragraph 65 of said

complaint.

66. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 66 of said complaint.

67. Admits that, during the period from 1927 to May, 1929, this defendant did not accept the form of license agreement submitted by U.S.G., and referred

to in paragraph 61 of this answer, and that the period aforesaid was marked by an intensification of competition in the board industry; denies the formation, maintenance, consummation and existence of any plan for the stabilization of board prices of the character referred to in paragraph 67 of said complaint; and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations of paragraph 67 of said complaint.

68. Admits the allegations of paragraph 68 of said complaint, except that this defendant denies that the breakdown of license negotiations was the cause of this defendant

expanding its market for open-edge board.

69. Admits that the introduction of open-edge board on the market by this defendant at reduced prices constituted a substantial competitive threat to the remainder of the board industry, that American Gypsum Company, National, and Niagara Gypsum Company, who were then manufacturing board with semi-protected edges, attempted to meet the competition of the open-edge board manufactured by this defendant by marketing a second grade board which said companies sold at approximately the same price as that of open-edge board, and that Universal Gypsum & Lime Company commenced marketing second grade board in the fall of 1927 at prices below those charged by it for its first-grade product; but avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 69 of said complaint with respect to the refusal of U.S.G. to reduce or

to permit its licensees to reduce the basic prices for closed-edge board or the agreement by U.S.G. to permit said licensees to manufacture and distribute

at reduced prices a second grade closed-edge board.

70. Admits the allegation of paragraph 70 of said complaint, except that this defendant denies that U.S.G.'s refusal to modify the royalty provisions of the license agreement between U.S.G. and Beaver operated to prevent the production of open-edge board at the Beaver plants.

71. Admits the allegations of paragraph 71 of said

complaint.

72. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of

the allegations of paragraph 72 of said complaint.

73. Avers that this defendant is without knowledge or information sufficient to form a belief as to the reasons why manufacturers other than this defendant reduced prices of open-edge board; admits that in 1929 the prices for all board were substantially below 1927 levels and that during 1928 the prices of other gypsum products were substantially reduced.

74. Denies each and all of the allegations of paragraph 74 of said complaint, except that this defendant admits that during the year 1928 or the early part of the year 1929 there was some discussion between representatives of this defendant and others in the industry relative to the possibility of this defendant becoming a licensee of U.S.G.

75. Admits that the Utzman patent expired in August, 1929; denies (a) that U.S.G. through said Avery assured representatives of this defendant that, if a license agreement between U.S.G., as licensor, and this defendant, as licensee, were executed, U.S.G. would then take steps to control the prices of its licensees throughout the life of the licenses under color of some patent, and (b) that, in reliance upon these assurances, this defendant agreed with National, Ebsary, Niagara Gypsum Company and U.S.G. to become licensees of U.S.G.; avers that, as alleged in paragraph 70 of said complaint, following the acquisition by this defendant of the assets of said The Beaver Products Company, Inc. and the refusal of U.S.G. to modify the royalty provisions of its license agreement with said The Beaver Products Company, Inc., this defendant refused to perform said agreement, that, following such refusal on the part of this defendant, U.S.G. instituted suit against this defendant, said The Beaver Products Company, Inc. and said The Beaver Board Companies in the District Court of the United States for the Northern District of Illinois, seeking an accounting under the aforesaid agreement between U.S.G. and said The Beaver Products Company, Inc., specific performance of said agreement, the entry of a decree enjoining this defendant from disposing of the property and assets acquired by this defendant from said The Beaver Products Company, Inc. and said The Beaver Board Companies, and other relief, that, upon the filing by U.S.G. in said suit of a motion for a preliminary injunction, this defendant filed its bond in the penal sum of \$1,000,000.00 with George M. Brown and Elisha Walker, then directors of this defendant, as sureties, which bond was conditioned upon the payment by this defendant of any judgment, decree, costs, interest, or damages, 324 which might be finally rendered or assessed against any one or more of the defendants in said suit, that, in and by the agreement between this defendant and said The Beaver Board Companies and said The Beaver Products Company, Inc. providing for the purchase by this defendant of the assets aforesaid, this defendant specifically assumed, with certain exceptions enumerated in said agreement, all outstanding liabilities and obligations of said The Beaver Board Companies and said The Beaver Products Company, Inc., that the liabilities and obligations thus assumed by this defendant included the obligations of said The Beaver Products Company, Inc. under its aforesaid license agreement with U.S.G., that, by virtue of such assumption and the nature and character of the purchase by this defendant

of the assets aforesaid, this defendant, at the time of the institution by U.S.G. of the suit aforesaid, had become obligated by virtue of the acquisition of said assets to perform the obligations of the licensee under said agreement between U.S.G. and said The Beaver Products Company, Inc., and this defendant had no adequate defense to said suit, that, in the light of the circumstances aforesaid, the institution of said suit by U.S.G. constituted one of the controlling factors inducing this defendant to agree with U.S.G. to become a licensee of U.S.G. and to execute the license agreement more particularly referred to in paragraph 76 of said complaint; that the execution by this defendant of said license agreement was not the subject matter of any agreement, understanding or undertaking between this defendant and National, Ebsary, of Niagara Gypsum Company, and that this defendant did not agree to become a licensee of U.S.G. or to execute said license agreement in reliance upon any agreement.

or Niagara Gypsum Company likewise to become a licensee of U.S.G.; and further avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations

of paragraph 75 of said complaint.

76. Avers that, motivated by the reasons set forth in paragraph 75 of this answer, and because of its desire to obtain the right to manufacture closed-edge board, for which there was strong public demand, during the period between May 16 and May 22, 1929, this defendant entered into a license agreement with U.S.G., a duplicate original of which has heretofore been furnished by this defendant to the Additional Grand Jury for the April, 1940 term of this Court in response to a subpoena duces tecum issued at the instance of the Attorney General of the United States, that the aforesaid duplicate original of said license agreement is presently in the possession of the Attorney General of the United States, that said license agreement differs in certain particulars from the license agreement between U.S.G. and Ebsary set forth as Exhibit No. 3 in the appendix to said complaint, and from the license agreement between U.S.G. and The Beaver Products Company, Inc. set forth as Exhibit No. 2 in the appendix to said complaint; that said Exhibit No. 3 and said Exhibit No. 2 differ from each other in certain particulars, and that the aforesaid license agreement between U.S.G. and this defendant contains no provision of the character specified in subdivision (b) of paragraph 76 of said complaint; and further avers

that this defendant is not informed as to the form and contents of the several license agreements between

U.S.G. and National and between U.S.G. and Niag-326 ara Gypsum Company referred to in paragraph 76 of said complaint or as to whether the license agreement between U.S.G. and Ebsary referred to in said paragraph 76 was in the form set forth as Exhibit No. 3 in the appendix to said complaint; and further avers that this defendant is without knowledge or information sufficient to form a belief as to whether all of the licensees of U.S.G. were represented at the meeting or meetings referred to in paragraph 76.

77. Denies each and all of the allegations of paragraph 77 of said complaint; and, without limiting the generality of the foregoing, denies that U.S.G. and its licensees mu-

tually agreed among themselves as follows:

(a) that said companies would immediately discontinue the manufacture of unpatented open-edge board and second grade closed-edge board and would dispose of inventories of said boards at prices to be determined and fixed by U.S.G. and that, after disposal of said inventories, all companies would manufacture and sell a closed-edge board manufactured and bundled by the processes and methods used by U.S.G.;

(b) that U.S.G. would advance and stabilize the prices for board immediately after the execution of said license agreements and that, as prices for board were increased, all companies would increase their prices for plaster and

miscellaneous gypsum products; and/or
(c) that U.S.G. would continue to control, through the use of other patents, the price of its licensees for board manufactured by said licensees after the expiration of the

Utzman patent in August, 1929;

and avers that this defendant did not at any time  $327^{\circ}$ enter into any agreement, understanding or undertaking with U.S.G. or with any one or more of the other licensees of U.S.G. with respect to the subject matter of

said paragraph 77.

78. Except to the extent that such allegations are hereinafter in this paragraph specifically admitted, denies each and all of the allegations of paragraph 78 of said complaint, as applied to this defendant; admits that, immediately after the execution of the agreement between U.S.G. and this defendant referred to in paragraph 76 of said complaint. U.S.G. offered to enter into an additional license agreement with this defendant, permitting this defendant to practice a new invention developed by U.S.G. for lightening the weight of board, hereinafter referred to as "the foam invention" and that said foam invention was covered by pending applications for United States patents; avers that U.S.G. at no time entered into any agreement with this defendant to establish, maintain or continue price control, either prior to or subsequent to the expiration of the Utzman patent, and that the aforesaid additional license agreement was not offered by U.S.G. to this defendant pursuant to any such agreement to establish, maintain or continue price control; and further avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 78 of said complaint.

79. Admits that the foam invention may be generally described as involving the introduction of foam into the slurry as an aggregate to cause the formation of numerous

air voids in the board, and that said process requires
328 that the numerous minute bubbles in the foam be
sufficiently stable and pliable to resist collapse during the process of manufacturing board; and avers that
this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of
paragraph 79 of said complaint with respect to whether,
at the time U.S.G. offered said foam process to this defendant or to other licensees of U.S.G., U.S.G. contemplated for
the purpose of obtaining stability and pliability in the bubbles, the use of several methods, including among others,
the use of a colloidal agent such as farinaceous paste to
reinforce the walls of the bubbles.

80. Admits that, at the time U.S.G. offered to license this defendant to practice the foam invention, Universal Gypsum & Lime Company owned United States Letters Patent No. 1,230,297 issued to Charles E. Hite on June 17, 1917 and United States Letters Patent No. 1,500,452 issued to Joseph F. Haggerty on July 8, 1924, that a true and correct copy of said Hite patent is set forth as Exhibit No. 4 in the appendix to said complaint, and that a true and correct copy of the Haggerty patent is set forth as Exhibit No. 5 in the appendix to said complaint; but avers that the summaries of the claims of said Hite and Haggerty patents contained in said paragraph 80 are incomplete and inaccurate.

81. Avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 81 of said complaint.

82. Denies that the contemplated use of farinaceous paste to reinforce the walls of the bubbles would not have in-

fringed the Hite and Haggerty patents, and denies that U.S.G. advised this defendant that the Hite and Haggerty patents were of doubtful validity and that the

foam process did not infringe said patents; and avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 82 of said

complaint.

83. Admits that U.S.G. agreed to purchase the Hite and Haggerty patents from Universal Gypsum & Lime Company, that U.S.G. did acquire said patents from Universal Gypsum & Lime Company, and that this defendant agreed to accept a license from U.S.G. covering said patents and the foam invention; defies that this defendant at any time entered into any agreement, undertaking or understanding with any other licensee or licensees of U.S.G. with respect to the acceptance by this defendant or by such other licensees of a license from U.S.G. covering said patents and the foam invention or with respect to the acquisition by U.S.G. of the Hite and Haggerty patents; and avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 83 of said complaint.

84. Except to the extent that such allegations are here-inafter in this paragraph specifically admitted, denies each and all of the allegations of paragraph 84 of said complaint; admits that U.S.G. agreed to acquire, and did acquire, said Hite and Haggerty patents, that U.S.G. and this defendant agreed to execute and did execute a license agreement covering said patents, and that U.S.G. entered into similar license agreements with certain of its other licensees; avers that this defendant entered into said license

agreement with U.S.G. for the sole and only purpose of availing itself of the benefit of the inventions embraced within said Hite and Haggerty patents and the foam invention, and the other patents held by U.S.G. and included in said license agreement; that at no time did this defendant enter into any agreement with U.S.G., or with any of the other licensees of U.S.G., with respect to the exercise by U.S.G. of price control of board manufactured by the licensees of U.S.G., and that U.S.G. at no time agreed with this defendant to exercise the right to specify minimum prices for board manufactured by this defendant or any other licensee or licensees of U.S.G.

85. Admits that, following the acquisition of the Hite and Haggerty patents by U.S.G. from Universal Gypsum

& Lime Company, this defendant became a licensee under a new license agreement with U.S.G., that said new license agreement superseded the license agreement between U.S.G. and this defendant referred to in paragraph 76 of said complaint, that, for an accurate and complete statement of the terms of said agreement, this defendant refers to a duplicate original of said new license agreement between U.S.G. and this defendant which was furnished to the Additional Grand Jury for the April, 1940 term of this Court in response to a subpoena duces tecum issued at the instance of the Attorney General of the United States; avers that said duplicate original of said license agreement is presently in the possession of the Attorney General of the United States, that said new license agreement differs in certain particulars from the agreement between U.S.G. and Ebsary set forth as Exhibit No. 6 in the appendix to said complaint; further admits that U.S.G. entered into similar agreements with National, Universal Gyp-

331 sum & Lime Company, Atlantic Gypsum Company, Ebsary, American Gypsum Company and Kelley Plasterboard Company, Inc.; and further avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 85 of said complaint.

86. Denies each and all of the allegations of paragraph

86 of said complaint.

87. Denies each and all of the allegations of paragraph 87 of said complaint, as amended, as aforesaid, in so far as the same purport to relate to the alleged agreements referred to in paragraph 86 of said complaint or to any agreements of similar character; admits that the sales by this defendant in the Eastern area of gypsum board manufactured by it amounted to approximately \$1,400,000 in the year 1929; and further admits, that, by virtue of the license agreement entered into between this defendant and U.S.G., U.S.G. was authorized to fix a minimum price for all gypsum board manufactured and sold by this defendant pursuant to said license agreement, which right to fix said minimum price was, by the terms of said agreement, to last for a period of seventeen years after the date of the issuance of certain letters patent; denies that, by virtue of the agreements referred to in paragraphs 85 and 86 of said complaint, all companies manufacturing and selling board in the Eastern area, except Texas, were obliged to manufacture a uniform standardized board; and avers that as to all other allegations of said paragraph 87 this

defendant is without knowledge or information sufficient

to form a belief as to the truth thereof.

88 Avers that this defendant is without knowledge or information sufficient to form a belief as to the 332 truth of the averments of paragraph 88 of said complaint, except that this defendant admits that the license agreement between U.S.G. and this defendant has been continuously in effect since the same was executed in the year 1929 and is now in effect; and this defendant avers that, the Haggerty patent having expired on July 8, 1941, this defendant was advised by U.S.G. on or about July 8, 1941, that bulletins and notices regarding current minimum prices theretofore sent to this defendant under its license agreement with U.S.G. of October 15, 1929, were no longer applicable, so that no minimum price restrictions upon gypsum board manufactured and sold by this defendant are now in force and effect.

89. Denies the formation, maintenance, consummation and existence of the combination referred to in paragraph 89 of said complaint, or of any combination of similar

character.

90. Denies each and all of the allegations of paragraph 90 of said complaint, except that this defendant admits that during the period that the license agreement entered into between U.S.G. as licensor and this defendant as licensee has been in force and effect, and up to July 8, 1941, U.S.G. has, in accordance with the terms and provisions of said license agreement, fixed a minimum selling price for gypsum board manufactured and sold by this defendant and has likewise fixed certain of the terms and conditions of sale of such gypsum board, and that this defendant has observed the terms of said license agreement and has sold all gypsum board manufactured by it pursuant to the terms of said license agreement at not less than the minimum prices so fixed by said U.S.G. and on the terms and conditions of sale so determined by U.S.G.; and

except that this defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph 90 in

so far as the same refer to other licensees of U.S.G.

91. Admits that from time to time throughout the period from November 5, 1929, to the date of the filing of said complaint, U.S.G. has circulated among its licensees numerous bulletins setting forth the minimum selling prices and most favorable terms and conditions of sale for patented gypsum board, and that this defendant has adhered

to said prices and terms and conditions of sale in the sale of such board manufactured by it under its license agreement, and that certain of said bulletins are set forth as Exhibit 7 in the appendix to said complaint; but this defendant denies that subparagraphs (a) to (u) inclusive of paragraph 91 of said complaint accurately or sufficiently describe the contents of said bulletins; avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 91 of said complaint with respect to adherence by other licensees of U.S.G. to such prices and terms and conditions of sale; and further avers that adherence to such prices and terms and conditions of sale, either by this defendant or by any one or more of the other licensees of U.S.G., has never been the subject of any agreement, understanding or undertaking, either express or implied, between this defendant and any one or more of such other licensees.

92. Admits that, throughout the period aforesaid, U.S.G., through its officers, employees, attorneys and a corporation known as the Board Survey Company, has, in the exercise of the rights and privileges reserved to the licensor

334 under the agreement between U.S.G. and this defendant referred to in paragraph 85 of said complaint, made periodic examinations of the records of this defendant relating to sales of gypsum board, and that this defendant has, in discharge of its obligation under said agreement so to do, made regular reports to U.S.G. of sales of gypsum board by this defendant; avers that this defendant has at no time endeavored to evade or avoid its obligations under said agreement, and, so far as this defendant is concerned, no occasion has arisen requiring any action on the part of U.S.G. to enforce any of its rights, powers and privileges under said agreement; denies that this defendant has attended numerous meetings between U.S.G. and its licensees at which the prices and terms and conditions of sale prescribed by U.S.G. in said bulletins and at which complaints of violations by licensees of said bulletin prices were discussed; and further avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 92 of said complaint.

93. Denies that this defendant has entered into any agreement, understanding or undertaking, either express or implied, or has been a party to any concerted action with U.S.G. or any one or more licensees of U.S.G., relating to the scope of the patents referred to in paragraph 93 of

said complaint or relating to the production or refraining from production of open-edge board or other board not falling within the scope of said patents; avers that this defendant has refrained from manufacturing and marketing open-edge board during the period specified in said paragraph 93 for the reason that closed-edge board costs

less to manufacture, primarily because of the elimination of spoilage, and is a more marketable product, and that this defendant has refrained from
manufacturing and marketing other board not within the
scope of said patents, for the reason that such other board
would have constituted an inferior product which could not
be marketed in competition with patented board; denies
each and all of the allegations of the last sentence of said
paragraph 93; and further avers that, except as above
stated, this defendant is without knowledge or information
sufficient to form a belief as to the truth of the allegations

94. Denies each and all of the allegations of paragraph

94 of said complaint.

of paragraph 93 of said complaint.

95. Denies each and all of the allegations of paragraph 95 of said complaint, except that this defendant admits that U.S.G. from time to time issued to licensees bulletins fixing the minimum selling price to jobbers of patented gypsum board manufactured and sold by licensees at the same minimum price fixed for patented gypsum board manufactured and sold by licensees to dealers, and admits that this defendant observed said minimum prices so fixed, and further admits that several meetings were held by U.S.G. for the purpose of explaining and clarifying various bulletins issued by it; and except that this defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph 95 in so far as the same relate to the acts and conduct of licensees other than this defendant.

96. Denies each and all of the allegations of paragraph 96 of said complaint; and, without limiting the generality of the foregoing, denies that price control by U.S.G.

336 of gypsum board manufactured by its licensees has been exercised at any time throughout the period from the year 1929 to the date of filing said complaint upon gypsum board of the licensees not covered by valid patents involved in the license agreements, and that, from time to time during said period, U.S.G. and its licensees have by concerted action controlled the prices and methods of distribution of plaster and miscellaneous gypsum products sold by U.S.G. and its licensees.

97. Denies each and all of the allegations of paragraph 97 of said complaint, and, without limiting the generality of the foregoing, denies that, continuously during the period from May, 1929 to November, 1929, U.S.G. determined and fixed the prices and the licensees adhered to said prices for unpatented open-edge board, and that, during the period between August and November, 1929, U.S.G. determined and fixed the prices and the licensees adhered to said prices

for closed-edge board.

98. Admits that the first United States patent upon the foam invention was issued on October 8, 1935, that the second patent on said invention was issued on May 4, 1937, that the third patent on said invention was issued on May 11, 1937, that copies of said patents, being United States Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009, are set forth as Exhibits Nos. 8, 9 and 10 in the appendix to said complaint, and that, throughout the period from November, 1929 until October, 1935, U.S.G. exercised the right to fix the minimum selling price of patented gypsum board manufactured and sold by this defendant embodying the claims of the Hite and Haggerty patents; denies that, during the period from November, 1929 until October, 1935, none of the licensees of U.S.G. except Universal Gypsum

337 & Lime Company, manufactured board falling within the scope of said Hite and Haggerty patents; avers that, throughout the period last aforesaid, all gypsum board and lath manufactured by this defendant fell within the scope of said Haggerty patent; and further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 98 of said complaint, as applied to gypsum board manufactured by U.S.G. and other licensees of U.S.G.

99. Avers that a true and correct copy of said Hite patent is set forth as Exhibit No. 4 in the appendix to said complaint, and that the summary of said patent set forth in paragraph 99 of said complaint is incomplete and inaccurate; admits that, during the period described in paragraph 98 of said complaint, this defendant did not manufacture board falling within the scope of said Hite patent; and further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 99 of said complaint, as applied to gypsum board manufactured by U.S.G. and other licensees of U.S.G.

100. Avers that a true and correct copy of said Haggerty patent is set forth as Exhibit No. 5 in the appendix to

said complaint, and that the summary of said patent set forth in paragraph 100 of said complaint is incomplete and inaccurate; further avers that, during the period aforesaid, all board manufactured by this defendant fell within the scope of said Haggerty patent; and further avers that this defendant is without knowledge or information suffi-

cient to form a belief as to the truth of the allegations of paragraph 100 of said complaint, as applied to gypsum board manufactured by U.S.G. and other

licensees of U.S.G.

101. Avers that, during the period from October, 1935 to the date of filing this complaint, all gypsum board and lath produced by this defendant fell within the scope of said Haggerty patent and the aforesaid patents issued upon the foam process; denies that, during said period, none of the licensees of U.S.G. produced board which was covered by the Hite or Haggerty patents; and further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 101 of said complaint, as applied to gypsum board manufactured by U.S.G. and other licensees of U.S.G.

102. Avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 102 of said complaint.

103. Denies the allegations of paragraph 103 of said complaint, except that this defendant admits that, acting individually and not in concert or pursuant to agreement, this defendant has generally sold plaster and miscellaneous gypsum products on certain of the terms and conditions which this defendant has generally employed in the sale of patented gypsum board, and except that this defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 103 of said complaint in so far as the same apply to sales of plaster and miscellaneous gypsum products by U.S.G. and its other licensees.

104. Denies each and all of the allegations of paragraph
104 of said complaint, except that this defendant admits that gypsum board is frequently transported in
mixed cars or trucks with plaster and miscellaneous

mixed cars or trucks with plaster and miscellaneous gypsum products.

105. Admits the allegations of paragraph 105 of said

106. Denies each and all of the allegations of paragraph 106 of said complaint: and, without limiting the generality of the foregoing, denies that, when prices for plaster and

miscellaneous gypsum products from time to time have advanced, this defendant has frequently permitted dealers to purchase said gypsum products at prices prevailing prior to the price advances, that such purchases have been made ostensibly under protected job contracts, but have involved material not actually covered by said contracts, and that this defendant has knowingly permitted dealers to make such purchases at such prices for the purpose of allowing such dealers a competitive concession.

107. Denies each and all of the allegations of para-

graph 107 of said complaint.

108. Denies each and all of the allegations of paragraph 108 of said complaint; and, without limiting the generality of the foregoing, denies that, throughout the period from the year 1929 to the date of filing of said complaint, U.S.G. and its licensees have, by concerted action, induced and coerced manufacturing distributors purchasing gypsum board from U.S.G. and its licensees to resell said gypsum board to dealers and consumers at the bulletin prices determined and fixed by U.S.G. for sales of board by its licensees to dealers and consumers, as referred to in paragraph 91 of said complaint; and further denies that this defendant has at any time controlled or attempted to

control the prices charged by any manufacturing distributor to whom this defendant has sold gypsum

board or other gypsum products.

109. Denies each and all of the allegations of paragraph 109 of said complaint, and, without limiting the generality of the foregoing, denies that, as a condition to the consent of U.S.G. to sales by its licensees of gypsum board to said manufacturing distributors, U.S.G. has required that said manufacturing distributors adhere to said bulletin prices in reselling gypsum board to dealers and consumers, and that U.S.G. and its licensees have agreed among themselves to sell gypsum board to said manufacturing distributors only on condition that the distributors maintain and adhere to said bulletin prices; and avers that this defendant has from time to time requested the consent of U.S.G. to sales of gypsum board by this defendant to various manufacturing distributors, that, in the case of each such request, U.S.G. has granted its consent to such sale or sales, that, in no case, has U.S.G. imposed or attached any condition to such consent, and that U.S.G. has never threatened to withdraw and has never withdrawn any consent theretofore given to any such sale or sales by this defendant.

110. Denies the allegations of paragraph 110 of said complaint; and, without limiting the generality of the fore-

going, denies that U.S.G. and its licensees have required said manufacturing distributors as a condition of sale to agree, and that said manufacturing distributors have agreed, to resell gypsum board to dealers and consumers at said bulletin prices.

111. Denies the allegations in the first sentence of paragraph 111 of said complaint; and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allega-

tions of the second sentence of said paragraph.

112. Admits that U.S.G. and certain of its licensees have entered into separate license agreements covering the manufacture and sale of metallized board and perforated lath; but denies that said license agreements were entered into for the purpose of extending and strengthening the right to control minimum prices and terms and conditions of sale of gypsum products vested in U.S.G. under the basic license agreements referred to in paragraphs 85 and 88 of said

complaint.

113. Admits that in 1934 U.S.G. offered to license each of its licensees to manufacture and sell metallized board under a patent owned by U.S.G. covering metallized gypsum board, that, during the year 1934, this defendant agreed with U.S.G. to become, and did become, a licensee of U.S.G. under said patent, and that said license agreement is substantially identical with the license agreement between U.S. G. and Ebsary set forth as Exhibit No. 11 in the appendix to said complaint; denies that the several licensees of U.S.G. agreed among themselves to become licensees of U.S.G. under said patent; avers that the execution by this defendant of said license agreement with U.S.G. was not the subject of any agreement, understanding or undertaking between this defendant and any one or more of the other licensees of U.S.G. and was not conditioned or predicated upon the execution of a similar agreement by any one or more of such licensees; and avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 113 of said complaint.

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114. Denies each and all of the allegations of paragraph 114 of said complaint; and without limiting the generality of the foregoing, denies that, at the time of the execution of the license agreements referred to in paragraph 113 of said complaint, none of the licensees of U.S.G., except National, intended to manufacture metallized board, that all of said licensees, except National, intended to purchase metallized board from U.S.G. or National

tional for resale to dealers and consumers, that U.S.G. required its licensees to execute said license agreements in order to be enabled to purchase metallized board for resale to dealers and consumers, and that, throughout the period from the execution of said license agreements to the date of filing of said complaint, U.S.G. has determined and fixed the minimum prices and terms and conditions governing sales by its licensees of metallized board purchased by said licensees during said period from U.S.G. and National; and avers that, at the time of the execution of the license agreement between U.S.G. and this defendant referred to in said paragraph 113, this defendant intended to manufacture metallized board, that, pending the installation of the necessary equipment for such manufacture at the Buffalo. New York, plant of this defendant, this defendant purchased certain quantities of metallized board from U.S.G., that U.S.G. at no time specified or attempted to specify the minimum prices or terms and conditions on which this defendant might resell such metallized board, that this defendant proceeded to install in said Buffalo plant the equipment necessary for the manufacture of metallized board and since the completion of such installation, has continuously engaged in the manufacture of metallized board at said plant, that this defendant originally intended sim-

343 ilarly to equip other of its plants for the manufacture of metallized board, and that the sales of metallized gypsum board proved so inconsequential that this defendant determined that the expense of equipping other plants for the manufacture of metallized board was not warranted.

115. Admits the allegations of paragraph 115 of said complaint, except that this defendant denies that said patent merely purported to cover a gypsum lath with perforations, but avers that said patent did cover such

perforated lath.

116. Admits that the license agreements proposed by U.S.G. referred to in paragraph 115 of said complaint reserved to U.S.G. the right to determine and fix the minimum selling prices of perforated lath manufactured and sold by each of its licensees; but denies that U.S.G. agreed to fix such minimum prices of perforated lath at a differential above the price of straight lath.

117. Admits that this defendant, American Gypsum Company, Ebsary and Kelley Plasterboard, Inc., executed the license agreements offered by U.S.G., as alleged in paragraph 115 of said complaint; but denies that this defendant entered into said license agreement with U.S.G. in reliance upon the commitment of U.S.G. to fix the price of perforated

lath at a differential above the price of straight lath; and avers that, except as above stated, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 117 of said complaint.

118. Admits that, by the terms of the license agreement entered into by U.S.G. with this defendant, U.S.G. authorized this defendant to manufacture perforated lath

under said letters patent and reserved the right to determine the minimum price at which this defendant might sell perforated lath manufactured by this defendant pursuant to the terms of said license agreement, and admits that said license agreement contained the usual provision by which the licensee admitted the validity of the letters patent under which the license was issued and agreed not to contest said patent; and further admits that, throughout the period from the execution of the license agreement with this defendant to the month of May, 1938, U.S.G. exercised its right to fix the minimum selling prices of perforated lath manufactured and sold by this defendant and did fix and determine said minimum selling prices at a differential above the prices of straight lath, and that this defendant sold said perforated lath at not less than the said prices so fixed and determined by U.S.G.; and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph 118 as applied to sales of perforated lath by other licensees of U.S.G.

119 Denies each and all of the allegations of paragraph 119 of said complaint, except that this defendant admits that it was advised by patent counsel prior to the execution of said license agreement with U.S.G. that, in the opinion of such patent counsel, the claims embraced within said perforated lath patent did not rise to the dignity of an invention; but avers that at the same time said patent counsel advised this defendant that said patent was presumptively valid and that some District Judge might sustain the patent and a Circuit Court of Appeals might affirm such a decision, that the patent had tremendous nuisance value and that it would be very costly for this de-

fendant to attempt to make exactly what is shown in the patent; that, in order to avoid either extended and expensive litigation with U.S.G. with respect to the validity of said patent, which appeared probable in the event that this defendant declined to accept the license agreement tendered by U.S.G., or the expense and delay which would necessarily be involved in the development

of a perforated lath possessing the desirable characteristics covered by said patent but avoiding the claims thereof, and because of the fact that U.S.G., by virtue of the provisions of the basic license agreement referred to in paragraph 85 of said complaint, was authorized to determine and fix the minimum selling prices and terms and conditions of sale for all perforated lath manufactured and sold by this defendant, this defendant, in good faith and in the exercise of its sound business judgment, entered into said license agreement with U.S.G. covering perforated lath manufactured in accordance with said perforated lath patent: and avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 119 of said complaint in so far as the same refer to the knowledge, beliefs or acts of U.S.G. or of licensees, other than this defendant.

120. Admits that the validity of the patent referred to in paragraph 120 of said complaint has not been presented to or determined by any court of the United States, and that none of the licensees of U.S.G. has contested the validity of said patent; denies that this defendant has entered into any agreement, understanding or undertaking with any one or more of said licensees with respect to the contest of or acquiremence in said patent; avers that this defendant

is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph 120, except to the extent that such allegations are hereinabove in this paragraph specifically admitted or denied; and further avers that, in May, 1938, U.S.G. voluntarily included said patent under the terms and provisions of the general license agreements referred to in paragraphs 85 and 88 of said complaint, thus eliminating the royalty theretofore payable under the provisions of the license agreements referred to in paragraph 117 of said complaint, and that, thereafter, no occasion existed for the prosecution of infringements by U.S.G. or the contest of said patent by licensees of U.S.G.

121. Denies each and all of the allegations of paragraph

121 of said complaint.

122. Denies the existence, operation and formation of the combination referred to in paragraph 122 of said complaint; denies that the prices referred to in said paragraph 122 are or have been non-competitive; admits that the prices of gypsum board during the period subsequent to the execution of the license agreements referred to in paragraph 85 of said complaint have been higher than those prevailing prior to the execution of said agreements; avers that,

since the execution of said license agreements the minimum selling prices for gypsum board manufactured pursuant to said license agreements have been prescribed by U.S.G., in the exercise of the right and privilege so to do reserved to it as licensor under said agreement; that this defendant has no knowledge or information sufficient to form a belief as to the basis on which such prices have been from time to time established by U.S.G. and is without knowledge or information sufficient to form a belief as to the truth of

the allegations of said paragraph 122 to the effect that said prices have failed to reflect substantial

reductions in the manufacturing costs of U.S.G.; and further avers that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 122 of said complaint to the effect that each of the defendant companies has realized substantial profits in the manufacture and sale of gypsum board; and further avera that such profits, if any, as this defendant has from time to time realized as a result of the manufacture and sale of gypsum board have not been unreasonable or disproportionate to the cost of the investment by this defendant in the assets employed by it in its gypsum business.

123. Denies each and all of the allegations of paragraph 123 of said complaint, except that this defendant admits that this defendant, acting individually and not in concert or agreement, now distributes plaster and miscellaneous gypsum products on certain of the same terms and conditions of sale utilized by this defendant in the sale of its

gypsum board.

Further answering the allegations of said complaint, as to all of such allegations with respect to which this defendant in the foregoing numbered paragraphs of this Part I has averred that it is without knowledge or information sufficient to form a belief as to the truth of such allegations, this defendant demands that the plaintiff make strict proof thereof; and as to all other allegations of said complaint except such as are hereinbefore specifically admitted, this defendant denies each and all of such allegations, irrespective of whether the same have been heretofore specifically denied.

This defendant denies that it is or has been a party to any contract, agreement or understanding or to any com-

bination or conspiracy in restraint of trade in vio-348 lation of the provisions of Sections 1, 2 or 3 of the Sherman Antitrust Act, or in violation of any other provisions of the Antitrust Laws of the United States, and, therefore, prays that the relief prayed for in the complaint be denied and further prays judgment that the complaint be dismissed with costs to this defendant.

## PART II

## Answer of Defendant Henry J. Hartley

For answer to said complaint, the defendant Henry J. Hartley (hereinafter in this Part II sometimes referred to as "this defendant") admits, denies and avers as follows:

1. Admits that the complaint is filed and that these proceedings are instituted against the several defendants under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", said act being commonly known as the "Sherman Antitrust Act", but denies that this defendant, either alone or in conjunction with other defendants to this action or any other person or persons, firm or firms, corporation or corporations, whatsoever, either individually or on behalf of any other person, firm, or corporation, has heretofore engaged in or is now engaged in any action or course of action prohibited or declared illegal by Section 1, Section 2, or Section 3 of said Sherman Antitrust Act, or by any other provisions of said Act or of any of the antitrust laws of the United States, and denies that the plaintiff is entitled, under Section 4 of said Sherman Antitrust Act, to the relief prayed for in said complaint.

2. Adopts the definition of the term "defendant companies" set forth in paragraph 12 of said com-

plaint.

3. Admits that, as stated in paragraph 17 of said complaint, he is president of the defendant Certain-teed Prod-

ucts Corporation, a Maryland corporation.

4. Avers that, at a special meeting of the Board of Directors of the defendant Certain-teed Products Corporation duly and regularly called and held in accordance with the by-laws of said Certain-teed Products Corporation on the thirteenth day of May, 1939 at the office of said Certain-teed Products Corporation in the City of New York, State of New York, this defendant was elected a director of said Certain-teed Products Corporation to fill a vacancy then existing in said board, that, thereafter at said meeting, this defendant was elected president of Certain-teed Products Corporation to fill the vacancy then existing in said office, that this defendant has, since the date last afore-

said, continuously served said Certain-teed Products Corporation in the capacities aforesaid, that, prior to the date last aforesaid, this defendant had no business relations of any kind or character, either individually or in a representative capacity, with said Certain-teed Products Corporation or with any of the other defendants to said complaint, or with any jobber, manufacturing distributor or retail dealer of gypsum products, that this defendant does not have personal knowledge of any facts or events occurring or of conditions existing with respect to the subject matter of said complaint at any time prior to May 13, 1939,

and that, insofar as the period prior to May 13, 1939 is concerned, the knowledge of this defendant as to the pertinent facts respecting the subject matter of these proceedings is based entirely on information derived from an examination of the files and records of said. Certain-teed Products Corporation and interviews with the present officers and employees of said Certain-teed Products Corporation, that this defendant, in the course of the performance of his duties as president of Certain-teed Products Corporation has become familiar with the provisions of the several existing license agreements between United States Gypsum Company, as licensor, and said Certain-teed Products Corporation, as licensee, more particularly referred to in paragraphs 85 and 113 of said complaint and with various other contracts and agreements between said Certain-teed Products Corporation and other defendant companies relating to the manufacture, pur-chase, sale and distribution of gypsum products, that this defendant has not learned of or become aware of any agreement, understanding and/or arrangement, either now or heretofore existing between said Certain-teed Products Corporation and said United States Gypsum Company and/or any one or more of the other defendant companies relating to the manufacture, purchase, sale or distribution of gypsum products, except as expressed in the written agreements between the parties above referred to, and that none of said written agreements, either in letter or in spirit, violates any of the provisions of Sections 1, 2 and 3 of said Sherman Antitrust Act, or any other provisions of the antitrust laws of the United States.

5. Subject to the qualifications expressed in paragraph 4 of this Part II as to the source of the knowledge and information of this defendant with respect to the per-

351 tinent facts relating to the subject matter of these proceedings, adopts the answer of Certain-teed Products Corporation to said complaint as set forth in Part I.

Dated August 1, 1941.

O. Max Gardner,
O. Max Gardner,
Harold F. McGuire,
HAROLD F. McGUIRE,

1126 Woodward Building, Washington, D. C.,
Attorneys for Certain-teed Products
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352 In the District Court of the United States

[Title Omitted.] [File Endorsement Omitted.]

> Answer of United States Gypsum Company, Sewell L. Avery and Oliver M. Knode

## Filed August 1, 1941

United States Gypsum Company, a corporation, Sewell L. Avery and Oliver M. Knode, defendants herein, herein after sometimes referred to as "defendants" and "these

defendants", answering the Complaint as amended:

1. Admit that the Complaint was filed and the proceedings instituted under Section 4 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies" and commonly known as the "Sherman Anti-Trust Act", but deny that they or any one or more of them have violated or are now violating Sections 1, 2 or 3 of the Sherman Act, as alleged in said Complaint or otherwise and further deny that plaintiff is entitled, under Section 4 of the Sherman Act, to the relief prayed for in said Complaint.

2. Deny each and all of the averments of Paragraph 2 in so far as they refer to the defendant, United States Gypsum Company, except that these defendants admit that said United States Gypsum Company is engaged in a continuous course of selling and delivering gypsum products, including gypsum board and plaster, to dealers within the District of Columbia and is engaged in soliciting, through salesmen, orders for gypsum products from dealers within

the District of Columbia, and in promoting the sale of said gypsum products in the District of Columbia by advertising in the District of Columbia by means of signs and displays

in dealers' offices and at dealers' warehouses and by

its national periodical advertising and by distributing price lists and circulars among dealers within
the District of Columbia, and to that extent said defendant
transacts business within the District of Columbia. These
defendants are without knowledge or information sufficient
to form a belief as to the truth of the averments in Paragraph 2 of the Complaint in so far as they refer to the
defendant companies other than said United States Gypsum

Company:

3. Deny each and all of the averments contained in Paragraph 3 of the Complaint, except that these defendants admit that the defendant, United States Gypsum Company, maintains a sales office within the District of Columbia and maintains salesmen for the solicitation of business in said gypsum products as set forth in Paragraph 2 of this answer, and except that these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 3 in so far as they refer to the defendant, The Celotex Corporation.

4. Deny each and all of the averments contained in Para-

graph 4 of the Complaint.

5. Admit the averments contained in Paragraphs 5, 6,

7, 8, 9 and 10 of the Complaint.

6. Are without knowledge or information sufficient to form a belief as to the truth of the averments contained in

Paragraph 11 of the Complaint.

7. For brevity and convenience, these defendants adopt for the purposes of this answer the plaintiff's designation in Paragraph 12 of those companies described in Paragraphs 5, 6, 7, 8, 9, 10 and 11 of the Complaint as "defendant companies" and said defendants will sometimes be referred to in this answer as "defendant companies."

8. Admit the averments contained in Paragraphs 13 and

14 of the Complaint.

9. Are without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraphs

15, 16, 17, 18 and 19 of the Complaint. .

10. Admit, with respect to the averments contained in Paragraph 20 of the Complaint, that the defendant companies are engaged in the manufacture of gypsum products, principally gypsum board and gypsum plaster, at plants at various points throughout the United States so located as to have a readily accessible source of supply of

raw gypsum rock, either through mining or quarrying operations in the immediate vicinity of the plant or through water transportation of the crude gypsum from the source of supply located at points distant from the plant; and,

further answering, these defendants aver that plants
for the manufacture of one or more gypsum products now operated by defendant, United States Gypsum Company, in the Eastern area are located at: Oakfield,
N.Y., Boston, Mass., New Brighton, N. Y., Philadelphia,
Pa., Plasterco, Va., Jacksonville, Fla., Detroit, Mich., Grand
Rapids Mich., Gypsum, Ohio, East Chicago, Ind., Fort
Dodge, Ia., Sweetwater, Tex., Southard, Okla., Laramie,

Wyo., Loveland, Colo., Piedmont, S. D. aver, on information and belief, that such plants now operated by defendant, National Gypsum Company, in the Eastern area are located at: Clarence Center, N. Y., Akron, N. Y., New York, N. Y., Portsmouth, N. H., Saltville, Va., Savannah, Ga., National City, Mich., Fort Dodge, Ia., Medi-

cine Lodge, Kan., Rotan, Tex.

aver, on information and belief, that such plants now operated by defendant, Certain-teed Products Corporation, in the Eastern area are located at: Akron, N. Y., Grand Rapids, Mich., Fort Dodge, Ia., Acme, Tex., Blue Rapids, Kan.

aver, on information and belief, that the defendant, Celotex Corporation, operates a single plant located at Port Clinton, Ohio; that the defendant, Ebsary Gypsum Company, Inc., operates a single plant located at Wheatland, New York; that the defendant Texas Cement Plaster Company operates a single plant located at Plasterco, Texas: and that the defendant, Newark Plaster Company, operates a board plant at Kearney, New Jersey, and a plaster mill at Newark, New Jersey. These defendants admit that defendant, United States Gypsum Company, sells a part of said gypsum products in interstate commerce to distributors within the States east of the Rocky Mountains, and that said defendant, United States Gypsum Company, sells a part of said gypsum products in commerce between the States and the District of Columbia to distributors within the District of Columbia, but these defendants deny that it is the policy of defendant, United States Gypsum Company, to sell consumers and aver that said defendant rarely sells any part of its said products to consumers and further aver that the distributors to whom said defendant sells its said products are normally and in almost all instances dealers in building materials. These defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in said paragraph with respect to the sale of said gypsum products by said defendant companies other than said United States Gypsum Company. These defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in said paragraph with respect to the exact percentages of gypsum board and gypsum plaster manufactured

panies but aver that they are of the belief that the percentage alleged with respect to gypsum board is approximately correct, and, further answering, these defendants aver that the gypsum board so manufactured and sold in the Eastern area is a patented product embodying the claims and inventions of patents owned by the defendant, United States Gypsum Company, and that said defendant and its duly authorized licensees are the only persons or corporations having any legal right to manufacture and sell such gypsum board. For brevity and convenience, these defendants adopt for the purposes of this answer the plaintiff's definition of the Eastern area set forth in the third

sentence of said paragraph.

11. Admit the averments contained in Paragraph 21 of the Complaint, except that these defendants aver that such averments fail to state the complete process in the manufacture of calcined gypsum or stucco, and, further answering, these defendants aver that gypsum is a hydrous calcium sulphate rock (CA SO, 2H2O); containing approximately twenty per cent. (20%) of water of crystallization as an integral part of the gypsum, and aver that when the calcined gypsum or stucco is mixed with water it again takes on as an integral part its original content of water of crystallization. Further answering, these defendants aver that, although gypsum deposits are widely scattered over the United States, there are certain gypsum deposits in the United States which are and have been for many years the chief centers for the production of gypsum, these gypsum production centers being located in western New York State, the western part of Virginia, northern Ohio, the western and northeastern part of Michigan, Iowa (in and around Fort Dodge), the northern part of Texas, the southern and western part of Oklahoma, the southern and northeastern part of Kansas and southern California and, to a less extent, in Arizona, Colorado, Utah, Wyoming, Nevada and South Dakota.

12. Admit the averments contained in Paragraph 22 of the Complaint, except that these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in the third sentence of said paragraph although they admit that the Bureau of Mines' "Minerals Year-book, 1940, Review of 1939" re-

ported sales value figures substantially as alleged.

13. Admits the averments contained in the first and second sentences in Paragraph 23 of the Complaint and, further answering, these defendants aver that throughout the period of years of the existence of defendant, United States Gypsum Company, said company has constantly endeavored, through the efforts of its research department and through the yearly expenditure of substantial sums of money to improve the quality and performance record of the gypsum products, including gypsum plaster, which it offers to the users of building material products, and these defendants admit that since about the year 1900 gypsum has gradually displaced lime in plaster and that over ninety per

cent. (90%) of all plaster now used in building construction in the United States is made with gypsum, and these defendants aver that the steady and substantial increase in the use of gypsum plaster is at least in part due to the extensive research of defendant, United States Gypsum Company, in its constant effort to develop

improved building material products.

14. Deny each and all of the averments contained in Paragraph 24 of the Complaint, except as hereinafter specifically admitted, qualified ordenied. These defendants admit that commercial production of gypsum board commenced about 1905 and that for many years thereafter by far the greatest amount of gypsum board produced was board designed to be used as a base for plaster in wall and ceiling structures and known as plasterboard. Further answering, these defendants aver that in about 1925 defendant, United States Gypsum Company, adopted the practice of marketing a gypsum plaster base of smaller dimensions. designed, among other reasons, to facilitate the ease with which the product might be handled by workmen applying the lath to the stude of the building, but these defendants aver that there is no difference in the product known as plasterboard and the product known as gypsum lath but, on the contrary, the term "gypsum lath" has by custom in the trade been generally adopted to designate the product for-merly known as "plasterboard". Further answering, these defendants admit, upon information and belief, that the sales value of gypsum lath and plasterboard manufactured by the defendant companies and sold in the United States in 1939 was approximately \$13,000,000, of which approximately 90% represented board sold in the Eastern area, but these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in said Paragraph 24 regarding the percentage of products used as support for plaster in all wall and ceiling structures that is represented by gypsum lath and plasterboard, except that these defendants aver that gypsum lath and plasterboard are marketed in a highly competitive field, competing directly with other products used for plaster bases, such as wood lath, metal lath, insulating lath and wire lath, and these defendants aver that, from information available to them, the percentage of gypsum lath and plasterboard used in wall and ceiling structures in residential buildings is substantially less than the 90% averred in the Complaint.

15. Admit the averments contained in the first three sentences of Paragraph 25 of the Complaint, and, upon information and belief, admit the averments contained in the fourth sentence of said paragraph, and further answering, these defendants aver that the market for substitutes for plaster and lath is a highly competitive one and that in said market gypsum wallboard is directly competitive with masonry, lumber, plywood, insulation board, paper fiberboard and steel.

16. Deny each and all of the averments contained in

Paragraph 26 of the Complaint, except as hereinafter specifically admitted, qualified or denied. These de-357 fendants aver that all gypsum board consists of two outer sheets of heavy, tough paper, front and back. between which there is a lightened gypsum core which is firmly bonded to the paper; that the gypsum board is fairly rigid, saws and nails like lumber, and because of its gypsum composition is fireproof and will not warp, buckle or rot; that the dimensions of the gypsum wallboard vary as to length, width and thickness but that generally it is in sheets, 4' wide, with lengths from 4' to 12' and having a thickness of 1/4", 3/8" or 1/2", that the dimensions of gypsum lath or plasterboard vary as to length, width and thickness, depending upon use, but that said product is usually of the size of 16" in width, 48" in length and 3%" in thickness; and that the dimensions of gypsum sheathing sold by defendant, United States Gypsum Company, are usually 2' x 8' x ½". Further answering, these defendants aver that gypsum lath and plasterboard are covered with heavy. tough sheets of paper, which are coarse and absorbent in order that the plaster may thereby obtain a better bond to the gypsum lath and plasterboard and that both of the

outer sheets of paper of gypsum wallboard are of a good grade of heavy, tough, smooth paper and that because the product is not intended to be covered with plaster, one of its said surfaces is especially treated so as to make it a

suitable interior wall surface.

17. Admit the averments contained in Paragraph 27 of the Complaint, except that, further answering, they aver that gypsum board covered with a metallic foil on one or both of its surfaces embodies the inventions and improvements set forth and claimed in certain United States Letters Patent and that defendant, United States Gypsum Company, and its duly authorized licensees, are the only persons or corporations having a legal right to manufacture and sell such patented product in the United States and except that they aver that perforated gypsum lath embodies the inventions and improvements set forth and claimed in United States Letters Patent No. 1,938,354, issued to defendant, United States Gypsum Company, on December 5, 1933, and that said defendant and its duly authorized licensees are the only persons or corporations having a legal right to manufacture and sell such perforated gypsum lath in the United States. Further answering, these defendants aver that the perforations in such gypsum lath not only permit the . plaster, when applied to the lath, to penetrate through the perforations and to form heads on the back of the lath which act as mechanical keys to increase the bond between the lath and the layer of plaster but also, in numerous other particulars constitute such an improvement and advancement in the art as to greatly increase the utility and enlarge the market for such gypsum lath.

18. Admit, with respect to the averments contained in Paragraph 28 of the Complaint, that the manufacture of plaster from calcined gypsum involves a relatively simple operation as compared with the manufacture of gypsum board from calcined plaster, but these defendants deny that the operation of manufacturing plaster from calcined gyp-

sum is adequately described in said paragraph and aver that such manufacture involves a substantial investment in plant, equipment and machinery which will produce, bag by bag, a proper proportion of the calcined gypsum, fibre and chemicals and effect the intimate mixing of these ingredients necessary to insure a proper and uniform result. These defendants aver that the manufacture of gypsum board from calcined gypsum requires a substantial investment in plant, expensive equipment and machines and admit that such manufacture involves

a much more complicated operation than the manufacture of plaster and that all gypsum calcining plants are equipped to manufacture gypsum plaster but that said plants are

not always equipped to manufacture gypsum board.

19. Admit that the averments contained in Paragraph 29 of the Complaint describe in a general way the usual process of manufacturing gypsum board, except that these defendants aver that in addition to the processes described in said paragraph the manufacture of such board involves the addition of chemicals for the purpose of accelerating and controlling the "set" of the gypsum core, the scoring and folding over of one of the heavy paper covers so as to cover the edges of the board, the chamfering of the back paper in order to make a uniform thickness, the recessing of the edges in the case of wallboard, the cutting of the board to length, and the drying of the board by passing it through the drying kilns. Further answering, these defendants admit that until the year 1929 the most commonly used aggregate for lightening the board was sawdust, although the defendant, United States Gypsum Company, had prior thereto used foam in lieu of sawdust in the manufacture of substantial quantities of gypsum board, and admit that since the year 1929 said aggregate has generally been composed of soap foam or chemical compounds embodying the inventions set forth and claimed in United States Gypsum. Company's applications for Letters Patent covering its foam lightened or cellular gypsum board and the patents issued thereon.

20. For brevity and convenience, these defendants adopt for the purposes of this answer plaintiff's definitions of the terms "plaster", "lath", "plasterboard" and "wallboard" as set forth in Paragraph 30 of the Complaint and sometimes hereinafter in this answer gypsum plaster will be referred to as "plaster", gypsum lath as "lath", gypsum plasterboard as "plasterboard" and gypsum wallboard as

"wallboard."

21. Deny each and all of the averments contained in Paragraph 31 of the Complaint, except as hereinafter specifically admitted, qualified or denied. These defendants admit that defendant, United States Gypsum Company, was incorporated in 1901, and, further answering, aver that prior thereto the gypsum business had represented a purely local operation and that the incorporation of defendant, United States Gypsum Company, represented the first effort to conduct a gypsum business upon a nationwide scale and thus to secure the benefits of more efficient

management and production and the opportunity for greater research in the improvement and development of gypsum products. These defendants admit that from the date of its incorporation to the present time defendant,

date of its incorporation to the present time defendant, United States Gypsum Company, has been the largest producer of gypsum board and plaster in the

United States and that said company produced and sold in 1939 approximately 55% of all gypsum board sold in the Eastern area, but these defendants are without knowledge or information sufficient to form a belief as to the truth of the averment that in 1939 said defendant. United States Gypsum Company, produced and sold approximately 40% of all plaster sold in the Eastern area. These defendants admit that in 1939 the sales by defendant, United States Gypsum Company, in said area of gypsum board manufactured by it amounted to approximately \$10,-600,000. Further answering, these defendants aver that defendant, United States Gypsum Company, during the twenty years preceding the filing of the Complaint herein, acquired the gypsum plants of eight other producers, including the Niagara Gypsum Company, which at the date of its said acquisition in 1929 had been engaged in the production of gypsum plaster and plasterboard for over ten years, and of gypsum wallboard for six or seven years, but has not acquired the plant or plants of any producer. of gypsum board since that acquisition; and that in the past ten years said defendant has not acquired the plants of any producer of gypsum plaster, except for the acquisition of the plant of one producer situated outside the said Eastern area which was acquired in order to give said defendant proper plant facilities to more effectively serve the territory in the vicinity of the plant so purchased. During said twenty-year period referred to above, said defendant. United States Gypsum Company, has made substantial improvements in and additions to its gypsum plaster and board plant facilities and equipment and has huilt and equipped new, modern plants at Sweetwater, Texas; Midland, California; Boston, Massachusetts; Philadelphia, Pennsylvania; Detroit, Michigan; East Chicago, Indiana; and Jacksonville, Florida. These defendants admit that defendant United States Gypsum Company now operates sixteen plants in the lastern area and aver that gypsum board is produced at thirteen of said plants.

22. Deny each and all of the averments contained in Paragraph 32 of the Complaint, except that these defendants admit that since 1925 defendant. United States Gyp-

sum Company, has expanded into fields of other allied building materials and is now a manufacturer of all of the building material products listed in said paragraph except insulation wool, which product is manufactured for it.

23. Admit, on information and belief, the averments contained in Paragraph 33 of the Complaint except that they are without knowledge or information sufficient to form a belief as to the truth of the averments regarding the percentage of plaster sold by defendant, National Gypsum Company, in the Eastern area in 1939, and regarding the details of its acquisition of Universal Gypsum & Lime Company in 1935 and Atlantic Gypsum Products Corporation in 1936.

24. Are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 34 of the Complaint, except that these defendants admit that the defendant, National Gypsum Company, has expanded into fields of other allied building ma-

terials.

25. Admit, on information and belief, the averments contained in Paragraph 35 of the Complaint except that they are without knowledge or information sufficient to form a belief as to the truth of the averments (a) as to the percentage of plaster sold by defendant, Certain-teed Products Corporation, in the Eastern area in the year 1939, (b) as to the importance of said defendant as a producer of the various materials referred to in the fourth sentence of said paragraph, and (c) as to the details regarding its acquisition of the Acme Cement Plaster Company plants in 1923 and the Beaver Companies in 1928. 26. Admit, on information and belief, the averments

contained in Paragraph 36 of the Complaint except that these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments regarding the percentages of plaster sold by the respective defendant companies in the Eastern area in 1939 and except that these defendants aver that defendant Newark Plaster Company has two plants, one for the manufacture of gypsum board and one for the manufacture of gypsum plaster.

27. Admit, on information and belief, the averments contained in Paragraph 37 of the Complaint except that they are without knowledge or information sufficient to form a belief as to the truth of the averments regarding the details of the acquisition of American Gypsum Com-

pany by defendant Celotex Corporation.

28. Admit, on information and belief, the averments contained in Paragraph 38 of the Complaint except that they are without knowledge or information sufficient to form a belief as to the truth of the averments regarding the acquisition of Kelley Plasterboard Company, Inc., by defendant Newark Plaster Company and except that they deny that said Kelley Plasterboard Company, Inc. had been engaged in the production of gypsum wallboard since

before 1918.

29. Are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 39 of the Complaint in so far as they refer to persons, companies or corporations other than the defendant, United States Gypsum Company. These defendants deny that the defendant, United States Gypsum Company, sells most of the gypsum board and plaster manufactured by it in interstate commerce and in commerce between the States and the District of Columbia, but these defendants admit that said defendant, United States Gypsum Company, sells most of the gypsum board and plaster manufactured by it to retail building material dealers located throughout the Eastern area, and these defendants aver that a substantial part of said sales are made to said retail building material dealers in intrastate commerce. Further answering, these defendants aver that defendant, United States Gypsum Company, from its inception has had the policy of selling its gypsum products through the dealer trade and has built the good will of its business upon such a policy, and these defendants accordingly admit that since 1929 and for many years prior thereto defend-

ant, United States Gypsum Company, has generally refrained from selling said gypsum products direct to contractors, as such sales would have destroyed, or tended

to destroy, its principal means of distribution.

30. Are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 40 of the Complaint in so far as they refer to defendants other than defendant, United States Gypsum Company. These defendants otherwise admit the averments contained in the first sentence of said paragraph except that, further answering, they aver that defendant, United States Gypsum Company, has only two such warehouses located in the Eastern area from which its said gypsum products are transported to dealers, these warehouses being located in the Metropolitan New York area. These defendants deny each and all of the averments con-

tained in the last sentence of said paragraph, and, on the contrary, aver that although gypsum board sold by said defendant is often transported in mixed cars or trucks of board, plaster and miscellaneous gypsum products said defendant also frequently makes straight carload or truckload shipments of its said gypsum board sold by it in said Eastern area.

31. Admit the averments contained in Paragraph 41 of

the Complaint.

32. Are without knowledge or information sufficient to form a belief as to the truth of the averments contained in the first sentence of Paragraph 42 of the Complaint in so far as they refer to defendant companies other than defendant, United States Gypsum Company, but these defendants deny said averments in so far as they refer to said United States Gypsum Company and, on the contrary, aver that said defendant's sales to manufacturing distributors constitute an inconsequential part of the total gypsum board manufactured by it and that such sales as said defendant makes to said manufacturing distributors are for the most part made in intrastate commerce. Further answering, these defendants admit the averments contained in the second sentence of said Paragraph 42, but are without knowledge or information sufficient to form a belief as to the truth of the averments contained in the third and last sentence of said paragraph.

33. Deny each and all of the averments contained in Paragraph 43 of the Complaint except as hereinafter specifically admitted, qualified or denied. These defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in said paragraph in so far as they refer to defendant companies other than defendant United States Gypsum Company and aver that for many years prior to the year 1932 said United States Gypsum Company had established and followed a policy of dealer distribution and had built up a valuable good will for said defendant and its gypsum products among the dealer trade in the entire United States and has at all time: distributed by far the greatest part of its said gypsum products through building material deal-

ers rather than jobbers although some of the dealers to whom said defendant sold its gypsum board and plaster have carried on for many years past and now are carrying on a jobbing business in the sale and distribution of less than carload quantities of gypsum board and plaster to other building material deal-

ers. Further answering, these defendants admit that jobbers to whom gypsum board was sold by some manufacturers of such board resold said board to retail dealers in competition with the defendant companies and other manufacturers of gypsum plaster and board and these defendants admit that some of said jobbers were also engaged in the manufacture of plaster from calcined gypsum at mixing plants owned or operated by said jobbers.

34. Deny each and all of the averments contained in

Paragraphs 44 and 45 of the Complaint.

35. Deny each and all of the averments contained in Paragraph 46 of the Complaint and, further answering, these defendants aver that through extensive research work carried on by the expenditure each year of substantial sums of money, the defendant, United States Gypsum Company, developed extensive improvements in the art of manufacturing gypeum products and in the character and quality of such products and acquired and now owns numerous United States Letters Patent covering its inventions and improvements embodied in said gypsum products and in their manufacture, particularly with regard to gypsum board. Further answering, these defendants aver that, in accordance with the patent laws of the United States, the defendant, United States Gypsum Company, acquired a legal monopoly in the manufacture, sale and use of such gypsum products embodying the inventions and improvements set forth and claimed in its said patents and that, after due deliberation, said defendant determined to share its said monopoly with other manufacturers of gypsum board through the granting of licenses to manufacture and sell gypsum board embodying the inventions and improvements set forth and claimed in said defendant's patents, to the end that the gypsum industry and the public generally might benefit through the production and enjoyment of a superior product they could. not otherwise have produced or had, and, as a condition in said licenses and for the reasonable and appropriate protection of the patent rights which it has acquired, the defendant, United States Gypsum Company, reserved the right to establish the minimum prices at which its licensees might sell the patented products so manufactured by them, pursuant to the terms of the license agreement. These defendants further aver that the right so reserved to defendant, United States Gypsum Company, was designed to and did protect said defendant's patent rights and was an entirely proper and legal restriction within the purview

of the patent laws and the decisions of the Supreme Court of the United States; that the said license agreements involved basic patents in the manufacture of gypsum board and were, in law and in fact, bona fide license agreements, reasonably designed to secure to the defendant, United States Gypsum Company, the pecuniary reward for its valid patent monopolies to which it was entitled.

363 36. Deny each and all of the averments contained in Paragraph 47 of the Complaint and, further answering, these defendants aver that neither they nor any one or more of them have entered into any combination, conspiracy or agreement with each other or with the other defendants named in the Complaint or any one or more of them in violation of Sections 1, 2 or 3 of the Sherman Act, either during the period between the month of September, 1925, and early in the year 1930, as alleged in the Complaint,

or at any other time or times.

37. Admit the averments contained in Paragraph 48 of the Complaint and, further answering, these defendants aver that shortly after the defendant. United States Gypsum Company, commenced the manufacture of gypsum board it became aware of the fundamental need of an improvement in the board so as to eliminate the disadvantages of an open-edge board, leaving the core of the board exposed and unprotected, and to the end of solving this need said defendant caused its employee, said Clarence W. Utzman, to devote his entire and undivided attention to the solving of this problem; that after a period of approximately a year and a half of experimentation and research said Utzman found the solution to the problem in his invention of the closed-edge board, as set forth and claimed in United States Letters Patent No. 1,034,746, issued on August 6, 1912, to defendant, United States Gypsum Company, in accordance with the understanding and agreement of said defendant and its said employee, Utzman, for the terms of which patent these defendants beg leave to refer to the original Letters Patent upon the trial of this cause. For brevity and convenience, these defendants adopt for the purposes of this answer plaintiff's description of said United States Letters Patent No. 1,034,746 as the "Utzman patent" and the board embodying the edges described in said patent as "closed-edge board" and the board with an unprotected edge as "open-edged board" and such patent, such closed-edge board and such unprotected-edge board will sometimes hereinafter be referred to as the "Utzman patent", "closed-edge board" and "open-edge board", respectively.

38. Admit the averments contained in Paragraph 49 of the Complaint and, further answering, these defendants aver that, in addition to the substantial improvement which the closed-edge board represented over that on the market by eliminating chipping and crumbling of the core at the edges, said closed-edge board represented a further substantial improvement among others in reducing manufacturing costs and production problems involved in the manufacture of gypsum board as theretofore produced

39. Admit the averments contained in Paragraphs 50 and 51 of the Complaint and, further answering, these defendants aver that the said courts in upholding the validity of said Utzman patent determined that the closed edge was the heart of the invention described in said patent.

40. Admit the averments contained in Paragraph 52 of the Complaint and, further answering, these defend-

ants aver that the inventions and improvements set forth and claimed in United States Letters Patent No. 1,358,508, known as the Birdsey patent, were the result of extensive research and experimental work carried on by the defendant, United States Gypsum Company, at its own expense, and that the patent was acquired by said defendant pursuant to understanding and agreement which said-defendant had with its employee, the said inventor. Birdsey.

41. Admit the averments contained in Paragraph 53 of the Complaint, except that these defendants aver that the board with semi-protected edges manufactured by American Gypsum Company and Universal Gypsum & Lime Company between the period 1920 and 1925 and manufactured by Niagara Gypsum Company was so like the board with edges covered by the Birdsey patent as to constitute, in law and in fact, an infringement of said Birdsey patent, and these defendants further aver that said American Gypsum Company, Universal Gypsum & Lime Company and Niagara Gypsum Company subsequently accounted to the defendant, United States Gypsum Company, in damages for their said infringement of the patent rights of said United States Gypsum Company.

42. Deny each and all of the averments contained in Paragraph 54 of the Complaint, except that these defendants admit that during the period from the latter part of 1925, after the defendant, United States Gypsum Company, had obtained judgment against said Beaver Products Company and after the filing of infringement suits against American Gypsum Company and Universal Gypsum & Lime Company and until the year 1930, efforts were made by the

parties to the respective infringement suits to settle the litigation with respect to the infringement of the patent rights of defendant, United States Gypsum Company, by the said respective defendants in said infringement suits.

43. Deny each and all of the averments contained in Paragraphs 55, 56, 57 and 58 of the Complaint and these defendants aver that, on the contrary, the suggestion of a license agreement from defendant, United States Gypsum Company, arose in the course of negotiations between the defendant, Sewell L. Avery, and Augustus S. Blagden, then President of the Beaver Products Company, which were initiated by said Blagden in an effort to bring about a settlement of the litigation then pending between his company and the defendant, United States Gypsum Company, wherein the Beaver Products Company had been adjudged an infringer of certain closed-edge board patents, including said Utzman patent, owned by defendant, United States Gypsum Company.

44. Deny each and all of the averments contained in

Paragraph 59 of the Complaint.

45. Deny each and all of the averments contained in Paragraph 60 of the Complaint, except that these defendants admit that the defendant, Sewell L. Avery, did attend, pursuant to invitation, a meeting held on or about the 20th day of May, 1926, at which meeting the possibility of the

settlement of all outstanding litigation between defendant, United States Gypsum Company, and other

manufacturers of gypsum board was discussed, and defendants aver that at said meeting each of the companies present expressed a willingness to consider becoming a licensee of United States Gypsum Company under the said Utzman patent, and the defendant, Sewell L. Avery, as President of defendant, United States Gypsum Company, expressed a willingness to consider such a settlement of outstanding litigation and the negotiation of such a license contract with each of the manufacturers of gypsum board who desired to secure such a license.

46. Deny each and all of the averments contained in Paragraph 61 of the Complaint and these defendants aver that, on the contrary, shortly after the meeting held on or about the 20th day of May, 1926, hereinbefore referred to in Paragraph 46 of this answer, defendant, United States Gypsum Company, and said Beaver Products Company, acting through their respective representatives and attorneys, proceeded to work out a settlement of the existing litigation between those companies, a part of which settle-

ment was the granting of a license contract from defendant, United States Gypsum Company, to said Beaver Products Company, granting to said Beaver Products Company a non-exclusive right and license to use the inventions and improvements set forth and claimed in certain patents and applications for Letters Patent owned by defendant. United States Gypsum Company, for the terms of which contract these defendants beg leave to refer to the original thereof upon the trial of this cause. Further answering, these defendants aver that upon the execution of said license contract by the defendant, United States Gypsum Company, and said Beaver Products Company the said defendant, United States Gypsum Company, expressed a willingness to negotiate a license contract, with each of the other manufacturers of gypsum board, which offer was not accepted by any other gypsum board manufacturer, except Universal Gypsum & Lime Company, as is hereinafter more fully set forth.

47. Are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 62 of the Complaint, except that these defendants admit that certain members of the industry did not accept a license contract from said United States Gypsum Company similar to the license granted to said Beaver

Products Company.

48. Deny each and all of the averments contained in Paragraph 63 of the Complaint, except that these defendants admit that certain companies considering the offer of said defendant, United States Gypsum Company, to negotiate with each of them a license similar to that granted said Beaver Products Company proposed that the license agreements under consideration cover only the Utzman patent and run only until the expiration of said patent, and except that these defendants admit that the defendant, Sewell L. Avery acting in his capacity as an officer of the

defendant, United States Gypsum Company, did not accept said counter proposal, and except that these

defendants are without knowledge or information sufficient to form a belief as to the truth of such averments with respect to the reasons prompting any company to make the counter proposal, as alleged in Paragraph 63 of the Complaint.

49. Deny each and all of the averments contained in Paragraph 64 of the Complaint, except that these defendants admit that said Beaver Products Company elected to settle the litigation then pending between it and the de-

fendant, United States Gypsum Company, and as part of said settlement said United States Gypsum Company granted a license contract to said Beaver Products Company in the form negotiated between the companies, and that the Universal Gypsum & Lime Company elected to settle the litigation between it and the defendant, United States Gypsum Company, and as a part of such settlement said United States Gypsum Company granted a license contract to said Universal Gypsum & Lime Company in form similar to the contract theretofore made between said defendant, United States Gypsum Company, and said Beaver Products Company, and, further answering, these defendants admit that the litigation between the defendant, United States Gypsum Company, and said Beaver Products Company was settled and the license contract granted under date of July 29, 1926, and the litigation between the defendant, United States Gypsum Company, and said Universal Gypsum & Lime Company was settled and the license contract executed under date of September 17, 1926. Further answering, these defendants admit that a copy of the Beaver Products Company license agreement is set forth as Exhibit 2 in the appendix to said Complaint, and for the terms of said license agreement and the Universal Gypsum & Lime Company license agreement these defendants beg leave to refer to the originals thereof upon the trial of this cause.

50. Are without knowledge or information sufficient to form a belief as to the truth of the averments contained in the first sentence of Paragraph 65 of the Complaint. These defendants deny the averments contained in the second sentence of said Paragraph 65 and aver that, on the contrary, representatives of said Atlantic Gypsum Products Company and said Texas Cement Plaster Company requested license contracts and that license contracts with each were executed on March 5, 1927, and April 18, 1927, respectively, both of which license contracts were similar to the license contracts theretofore granted by defendant, United States Gypsum Company, to said Beaver Products Company and said Universal L, psum & Lime Company, except as to the provisions of said latter contracts covering the payment of damages for past infringement. For the terms of said license contracts these defendants beg leave to refer to the originals thereof upon the

trial of this cause.

51. Deny each and all of the averments contained in Paragraph 66 of the Complaint, except that these defend-

ants admit that pursuant to the terms of said license contracts defendant, United States Gypsum Company, did from time to time following the execution of said

contracts exercise its right to establish the minimum price at which each of its said licensees might sell

gypsum board embodying the inventions and improvements set forth and claimed in said Utzman patent which was manufactured and sold by each such licensee pursuant to

the terms of its said license contract.

52. Deny each and all of the averments contained in Paragraph 67 of the Complaint, except that these defendants admit that the period from 1927 to May, 1929, was a period in which the prices of all gypsum products were from time to time reduced to a point where the prices had no relation whatsoever to the cost of production and the value of the product to the purchaser, with the result that all companies were carrying on their gypsum operations at a loss, to the detriment of said companies, their stockholders, bondholders and employees and to the detriment of the distributors of said products throughout the country, as well as others having any interest in the general welfare and

continued existence of the gypsum industry.

53. Admit, with respect to the averments contained in Paragraph 68 of the Complaint, that late in 1926 the defendant. Certain-teed Products Company, commenced the manufacture of open-edge board and sold its open-edge board at a differential below the price of closed-edge board, but these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in said Paragraph 68 as to the reasons for the action of Certain-teed Products Company in so pricing its said open-edge board and in making further price reductions, as alleged in said paragraph, and these defendants, further answering, aver that the open-edge board was, in fact, an inferior product to the closed-edge board and that it would be necessary to sell said open-edge board at a differential below the price of closed-edge board in order to attempt to overcome consumer preference for said closed-edge board.

54: Deny each and all of the averments contained in Paragraph 69 of the Complaint except that these defendants admit that the introduction of open-edge board on the market presented a competitive problem and that the American, National and Niagara Gypsum companies sold a second grade board at about the same price as that of open-edge board, but these defendants aver that for years prior

to the year 1927 there had always been second grade gypsum board resulting from the manufacture of board which failed in some particular to meet the perfection required of first grade board and that at least a part of this second grade gypsum board was sold to the same class of trade buying first grade board at prices lower than the prices charged for first grade board. Further answering, these defendants admit that Universal Gypsum & Lime Company commenced marketing a second grade board in the fall of 1927 at prices below those for its first grade board.

55. Admit; with respect to the averments contained in Paragraph 70 of the Complaint, that early in 1928 the defendant, Certain-teed Products Corporation, acquired

said Beaver Products Company, the second largest producer of board at that time and a licensee of said defendant, United States Gypsum Company, that said defendant, United States Gypsum Company, refused to modify the royalty provision of its license agreement with said Beaver Products Company to limit royalties to patented board only but these defendants deny that such refusal had anything whatsoever to do with permitting said Certain-teed Products Corporation to produce open-edge board at the Beaver Products Company plants and deny that permission of said United States Gypsum Company for. Certain-teed Products Corporation to manufacture openedge board at the Beaver Products Company plants was ever required or requested. Further answering, these defendants admit that Certain-teed Products Corporation refused to assume Beaver Products Company's agreement and commenced the production of an open-edge board at all of the Beaver Products Company plants, but these defendants are without knowledge or information sufficient to form a belief as to the reasons for Certain-teed Products Corporation's refusal so to assume said Beaver Products Company's agreement and its commencement of the production of open-edge board at all of the Beaver Products Company plants.

56. Admit the averments contained in Paragraph 71 of

the Complaint.

57. Deny each and all of the averments contained in Paragraph 72 of the Complaint except that these defendants admit that in the year 1928 the defendant, United States Gypsum Company, and those of its licensees not yet so doing sold their second-grade closed-edge board at prices competitive with those for open-edge board.

58. Deny each and all of the averments contained in Paragraph 73 of the Complaint except as hereinafter specifically admitted, qualified or denied. These defendants aver that defendant, United States Gypsum Company, reduced its prices on said board from time to time in order to make its prices competitive with other prices of gypsum board which it found in the field but they are without knowledge or information sufficient to form a belief as to the truth of the averments contained in said paragraph in so far as they refer to manufacturers other than said. United States Gypsum Company. Further answering, these defendants admit that by the year 1929 prices for all gypsum board were substantially below 1927 price levels and admit that during the year 1928, when prices for gypsum. board were declining, prices were substantially reduced for other gypsum products, but these defendants deny that such price reductions in other gypsum products applied principally to plaster and block.

59. Deny each and all of the averments contained in Paragraph 74 of the Complaint, except that these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments regarding the meetings and conferences alleged to have been held in the latter part of 1928 and the early part of 1929 by the

companies not yet licensees.

in Paragraph 75 of the Complaint, except that these defendants admit that the expiration date of the Utzman patent was August 6, 1929, and that the right of defendant, United States Gypsum Company, to establish the minimum price at which its licensees might manufacture and sell patented gypsum board embodying the claims and inventions of said Utzman patent did not extend beyond said date of August 6, 1929, in so far as such right to establish the minimum price of such patented products was based upon said defendant's rights as the owner of said Utzman patent.

61. Deny each and all of the averments contained in Paragraph 76 of the Complaint, except that these defendants aver that prior to the date of May 22, 1929, said defendants, Certain-teed Products Corporation, National Gypsum Company, Ebsary Gypsum Company, Inc., and said Niagara Gypsum Company had each determined to take a license agreement from defendant, United States Gypsum Company, giving to the licensees thereunder the right to manufacture and sell a closed-edge board embodying the inventions and improvements set forth and claimed

in certain patents, including said Utzman patent, owned by said defendant, United States Gypsum Company, and that at a meeting or conference on or about May 22, 1929, attended by representatives of said defendant, United States Gypsum Company, representatives of certain of its licensees and representatives of said Certain-teed Products Corporation, National Gypsum Company, Ebsary Gypsum Company, Inc., and Niagara Gypsum Company the details of said license contracts were worked out and separate license contracts were entered into with United States Gypsum Company by each of said last mentioned companies, for the terms of which these defendants beg leave to refer to the originals upon the trial of this cause. Further answering, these defendants admit that Exhibit 3 in the appendix attached to said Complaint is a copy of said license agreement so entered into between the defendants, United States Gypsum Company and Ebsary Gypsum Company, Inc.

62. Deny each and all of the averments contained in

Paragraph 77 of the Complaint.

63. Aver, with respect to the averments contained in Paragraph 78 of the Complaint, that prior to the invention of the cellular gypsum board produced by the foam process which these defendants admit was covered by pending applications for United States Letters Patent which in May, 1929, the defendant, United States Gypsum Company, expected to issue on its said pending applications before the end of the year 1929, it was customary in the gypsum board industry to lighten gypsum board by the use of sawdust in the gypsum mix but that the use of sawdust presented many problems, resulting in part from the variations in quality of the sawdust available and in part from the fact that a sufficient supply of sawdust was frequently difficult to obtain, and these defendants further aver that, after years of experimentation and the expenditure of substantial sums of money, defendant, United States Gyp-

sum Company, developed said use of foam in the board which afforded an efficient and less costly substitute for the sawdust formerly used and effectuated a marked improvement in the quality of the board so manufactured. Further answering, these defendants aver that said gypsum board containing the numerous minute cells was an outstanding contribution to the art of the manufacture of gypsum board and that the United States Letters Patent issued to said defendant, United States Gypsum Company, upon its said ap lications represent valuable patent rights of said defendant which it was and is entitled

to fully exploit; and these defendants further aver that defendant, United States Gypsum Company, knowing that said cellular gypsum board was an improved board and that its manufacture by the industry would therefore be beneficial not only to the industry but also to the users of gypsum board, accordingly determined after settlement of all pending patent litigation against other manufacturers of gypsum board to offer licenses under said patents to its board licensees provided said defendant's patent rights were duly and appropriately protected in such licenses and accordingly said defendant offered to enter into such a license agreement with each of its said licensees as averred in the first sentence of said Paragraph 78, but these defendants deny each and all of the averments contained in the last sentence of said Paragraph 78 and deny that there was ever any agreement whatsoever between said defendant, United States Gypsum Company, and its said licensees or any one or more of them that said defendant would continue price control after the expiration of said Utzman patent:

64. Deny each and all of the averments contained in Paragraph 79 of the Complaint, except that these defendants aver that at the time the cellular gypsum board licenses were offered to its board licensees by defendant, United States Gypsum Company, the foam process for producing cellular gypsum board consisted of the introduction of "soap foam", as averred in the Complaint, into the slurry as an aggregate to cause the formation of numerous air voids, or cells, in the board and except that these defendants admit that said process required that the numerous minute bubbles in the foam be sufficiently stable and pliable to resist collapse during the process of manufacturing board.

65. Admit the averments contained in the first sentence of Paragraph 80 and that a copy of United States Letters Patent No. 1,230,297, issued to Charles E. Hite on June 17, 1917, hereinafter sometimes referred to as the Hite patent, is set forth as Exhibit 4 in the Appendix to the Complaint and that a copy of United States Letters Patent No. 1,500,452, issued to Joseph P. Haggerty on July 8, 1924, hereinafter sometimes referred to as the Haggerty patent, is set forth as Exhibit 5 in the Appendix to the Complaint, but these defendants deny that the said Hite patent is in any way limited in its coverage to a heat-resistant, cementitious material, including calcined gypsum, containing voids produced by the use of a water-cooked gelatinized carbohydrate such as starch, and deny that said Haggerty

patent is in any way limited in its coverage to an improved wallboard manufactured by the use of water-cooked

starch gelatin to increase adhesion between the core and paper liners of the board, as might be inferred

from the averments in said Complaint and aver that said Haggerty patent does not disclose and in no way involves the use of gelatin. For the terms and disclosures of said United States Letters Patent No. 1,230,297 and No. 1,500,452 these defendants beg leave to refer to the originals

thereof upon the trial of this cause.

66. Are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 81 of the Complaint covering the purpose or purposes prompting the assertions of Universal Gypsum & Lime Company, but these defendants admit that said Universal Gypsum & Lime Company asserted that the use of farinaceous paste in the foam infringed the Haggerty and Hite patents and, further answering, these defendants aver that it was necessary that said defendant, United States Gypsum Company, acquire said patents for its protection against damage claims for prior infringement and for its protection in its continued manufacture of gypsum board.

67. Deny each and all of the averments contained in

Paragraph 82 of the Complaint.

68. These defendants deny each and all of the averments contained in Paragraph 83 of the Complaint, except that they aver that defendant United States Gypsum Company, agreed to acquire and did acquire said Haggerty and Hite patents in the manner specifically set forth in Paragraph 69

of this answer.

69. Deny each and all averments contained in Paragraph 84 of the Complaint, and, further answering, these defendants aver that at the time of the negotiations for the purchase of said Haggerty and Hite patents by defendant, United States Gypsum Company, said Universal Gypsum & Lime Company was in federal equity receivership, with its properties and business under the jurisdiction of the United States District Court for the Northern District of Illinois and six other United States District Courts where ancillary receivership proceedings were pending and these defendants admit that, after considerable negotiations with the receivers for said Universal Gypsum & Lime Company, said defendant, United States Gypsum Company, did agree with said receivers to acquire the said Haggerty and Hite patents and to grant to said receivers a license to manu-

facture and sell gypsum board embodying the inventions and improvements set forth and claimed in said defendant's patent application covering said cellular gypsum board and said foam process and any patents issuing thereon and in said Haggerty and Hite patents, subject, however, to said receivers first obtaining the approval of such sale and license by all of the Federal District Courts in which said receivership proceedings were then pending, and these defendants aver that said defendant, United States Gypsum Company, did acquire said patents from said receivers and did grant such license to said receivers, upon and with the approval of the said Federal District Courts upon

seven Federal District Courts fully setting forth the facts with respect to said sale and license. Further answering, these defendants aver that certain of its board licensees agreed with said United States Gypsum Company to accept a license from said United States Gypsum Company under said Haggerty and Hite patents and under the applications for letters patent and any letters patent issued thereon covering said cellular gypsum board and said foam process, and such license agreements were entered into between said United States Gypsum Company and certain of its said licensees, which licenses, however, did not become effective until the sale of the said Haggerty and Hite patents by the receivers of Universal Gypsum & Lime Company to said United States Gypsum Company had been approved by the United States District Court for the Northern District of Illinois and by the six United States District Courts in which ancillary receiverships were pending, as hereinbefore set forth.

70. Deny each and all of the averments contained in Paragraph 85 of the Complaint, except as hereinafter specifically admitted, qualified or denied. These defendants aver that after the defendant, United States Gypsum Company, had agreed with the Receivers for said Universal Gypsum & Lime Company to purchase said Haggerty and Hite patents, as hereinbefore set forth in Paragraph 69 of this answer, National Gypsum Company, Certain-teed Products Corporation, Universal Gypsum & Lime Company, Atlantic Gypsum Products Company and Ebsary Gypsum Company, Inc., entered into license agreements with United States Gypsum Company, but that said license agreements by their express terms did not become effective until after said Receivers had obtained the approval of the United States District Court of the conveyance and assignment of said Haggerty and Hite patents to defend-

ant, United States Gypsum Company. Subsequently American Gypsum Company and Kelley Plasterboard Company, Inc. also entered into license agreements with said United States Gypsum Company. For the terms of each of said license agreements so entered into these defendants beg leave to refer to the originals thereof upon the trial of this cause. Further answering, these defendants admit that when each of said license agreements went into effect it superseded all prior license contracts between the licensor and licensee thereunder except in the case of said American Gypsum Company and said Kelley Plasterboard Company, Inc., neither of which had theretofore entered into a license contract with said United States Gypsum Company.

71. Deny each and all of the averments contained in Paragraph 86 of the Complaint. Further answering, these defendants aver that for some years prior to the year 1929 defendant, United States Gypsum Company, had been using adhesives in the manufacture of board to improve adhesion between the core and the liners which were within the scope of said Haggerty patent and on information and belief aver that the other manufacturers of gypsum board were so using adhesives prior to the year 1929 which were within the scope of said Haggerty patent.

72. Deny each and all of the averments contained in Paragraph 87 of the Complaint except that these defendants are without knowledge and information sufficient to form a belief as to the truth of the averments contained in said paragraph as to the dollar sales of gypsum board in the Eastern area in 1929 by companies other than United States Gypsum Company and, further answering, these defendants aver that in the period from August 6, 1929 to February 10, 1937 said. United States Gypsum Company was not authorized to establish or control in any way the price or prices at which said Texas Cement Plaster Company might sell gypsum board and aver that said Texas Cement Plaster Company was at no time obliged to manufacture a uniform, standardized board by virtue of any agreement with said United States Gypsum Company. Further answering, these defendants aver that the dollar sales of gypsum board made by defendant, United States Gypsum Company, in the Eastern area in 1929 was substantially larger than the figure shown in said Paragraph 87.

73. Admit the averments contained in Paragraph 88 of the Complaint except that these defendants deny that the Texas Cement Plaster Company executed its said License Agreement in February 1937 under duress as is implied in said paragraph and aver that the execution of said License Agreement was the free and voluntary act of said Texas Cement Plaster Company and except that these defendants deny the averments in the second sentence of said paragraph.

74. For brevity and convenience in reference, these defendants adopt for the purposes of the remainder of this answer the plaintiff's definition of the meaning of the word "licensee" as set forth in Paragraph 89 of the Complaint, except that these defendants deny the formation or existence of any combination as set forth in the Complaint or

otherwise.

75. Deny each and all of the averments contained in Paragraph 90 of the Complaint, except that these defendants aver that following the execution of the license agreements referred to in Paragraph 85 of the Complaint, United States Gypsum Company has determined and established the minimum price or prices at which each licensee might sell patented gypsum board manufactured and sold by it under the terms of its said license contract and except that these defendants aver that during the period in which said minimum prices have been so determined and established by said defendant, United States Gypsum Company, its said licensees have sold a substantial part of all the gypsum board manufactured by them at prices not less than said minimum prices so determined and established by said United States Gypsum Company. Further answering, these defendants specifically deny that defendant, United States Gypsum Company, has maintained the prices of said gypsum board throughout the period from 1932 to the date of the filing of this complaint at high, arbitrary and non-competitive levels, but, on the contrary, these defendants aver that the prices at which such board has been sold by defendant, United States Gypsum Company,

and its said licensees during said period have been fair and reasonable and that such sales have been made in a highly competitive market, subject not only to the competition within the gypsum industry but also to the competition of non-gypsum products which are sold for the same general uses and purposes as said gypsum board; and, further answering, these defendants aver that at the time of the filing of this Complaint and for some period of time prior thereto the prices at which said gypsum board was sold were in fact substantially below the normal market prices for such product which had prevailed prior to the execution of the first license agreement between defendant, United States Gypsum Company, and Beaver Products Company on July 29, 1926, whereas the quality

and utility of such gypsum board were far superior to the quality and utility of the gypsum board then being

marketed.

76. Aver, with respect to the averments contained in Paragraph 91 of the Complaint, that defendant, United States Gypsum Company, has from time to time since the execution of the license agreements referred to in Paragraph 85 of the Complaint issued to each of its licensees bulletins setting forth the minimum prices at which such licensee might sell patented gypsum board manufactured by such licensee under its said license contract, including the setting forth of terms and conditions of sale reasonably necessary to the determination and establishment of such minimum prices, and these defendants aver that throughout said period each of its said licensees has in the main adhered to said minimum price bulletins in the sale of the patented board manufactured by such licensee under its said license contract. Further answering, these defendants admit that copies of certain of said minimum price bulletins are set forth in Exhibit 7 in the appendix to said Complaint, but these defendants deny that Subparagraphs (a) to (u), inclusive, of said Paragraph 91 accurately or sufficiently describe the terms and provisions of said minimum price bulletins, for the terms of all of which these defendants beg leave to refer to the originals thereof upon the trial of this cause.

77. Admit the averments contained in Paragraph 92 of the Complaint, except that these defendants deny that the alleged meetings between defendant, United States Gypsum Company, and its licensees have been numerous and deny that the alleged activities of said defendant, United States Gypsum Company, through its officers, employees and attorneys and said corporation known as Board Survey Company were anything more than was reasonably necessary to protect, by legal and proper means, the patent and contract rights of said defendant, and except that these defendants deny that defendant, United States Gypsum Company, has insisted upon auditing, or has audited, the books of any licensee who has exercised its right under the license contract to have such audit made by a certified public account.

78. Deny each and all of the averments contained in

Paragraphs 93 and 94 of the Complaint.

79. Deny each and all of the averments contained in Paragraph 95 of the Complaint except, with respect 375 to the fourth sentence of said Paragraph, these defendants deny knowledge or information sufficient to form a belief as to the truth of the averments with respect to others than defendant United States Gypsum Company and aver that said defendant's policy was to sell its gypsum products to jobbers and dealers at the same price.

80. Deny each and all of the averments contained in

Paragraphs 96 and 97 of the Complaint.

81. Admit, with respect to the averments contained in Paragraph 98 of the Complaint, that the first patent issued upon the cellular gypsum board and foam process applications was United States Letters Patent No. 2,017,022, issued October 8, 1935, and that subsequently two additional United States Letters Patent were issued on said applications, No. 2,079,338 issued May 4, 1937, and No. 2,080,009 issued May 11, 1937, and admit that copies of said patents are set forth in the appendix to the Complaint as Exhibits 8, 9 and 10, respectively, and for the terms and disclosures of all of said patents these defendants beg leave to refer to the originals thereof upon the trial of this cause. Further answering, these defendants deny each and all of the averments contained in the last two sentences of said Paragraph 98 and, further answering, they aver that throughout the period from November 5, 1929, to October, 1935, the defendant, United States Gypsum Company, exercised the right reserved to it in said license contracts referred to in Paragraph 85 of the Complaint to establish the minimum price or prices at which each licensee might sell gypsum board manufactured by such licensee and embodying the inventions and improvements set forth and claimed in letters patent under which said licensees were licensed, including the said Haggerty and Hite patents.

82. Deny each and every averment contained in Paragraph 99 of the Complaint except that these defendants aver that the inventions covered by said Hite patent included, among other things, a heat-resistant, cementitious material, including calcined gypsum, containing voids produced by the use of a water-cooked, gelatinized carbohydrate such

as starch.

83. Deny each and all of the averments contained in Paragraph 100 of the Complaint except that these defendants aver that the inventions covered by said Haggerty patent included, among other things, a board manufactured by a process involving the use of a water-cooked starch to increase adhesion between the core and the liners of the board.

84. Deny each and all of the averments contained in

Paragraph 101 of the Complaint.

85. Are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 102 of the Complaint, except that these defendants admit that the Kelley Plasterboard Company

did not commence manufacturing the foam light-

376 ened board until said company was acquired by the defendant, Newark Plaster Company, and except that these defendants admit that Texas Cement Plaster Company did not commence manufacturing the foam lightened board until February, 1937.

86. Deny, each and all of the averments contained in

Paragraph 103 of the Complaint.

87. Deny each and all of the averments contained in Paragraph 104 of the Complaint, except that these defendants aver that gypsum board is frequently transported in mixed cars or trucks with plaster and miscellaneous gypsum products.

88. Admit the averments contained in Paragraph 105

of the Complaint.

89. Deny each and all of the averments contained in Paragraph 106 of the Complaint, except that these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in said Paragraph 106, in so far as they refer to manufacturers other than said defendant, United States Gypsum Company. Further answering, these defendants aver that when prices for plaster and miscellaneous gypsum products from time to time have advanced the policy of defendant, United States Gypsum Company, has been to sell said products to all of its dealers at the prices in effect at the time of purchase, except in cases where the dealer-customer was entitled by contract or custom to protection at prices prevailing prior to the price advances.

90. Deny each and all of the averments contained in Paragraph 107 of the Complaint, except that these defendants admit that in the year 1936 defendant, United States Gypsum Company, and certain of its licensees and other manufacturers of gypsum products formed an association known as the "Gypsum Statistical Institute" and through said association set up an agency where each of the members of the Association could file data regarding their outstanding specific job contracts covering plaster, said action constituting a legal and proper attempt on the part of said defendant and the other gypsum manufacturers participating to protect themselves against the efforts of certain dealers to impose upon gypsum manufacturers by

making false and improper claims with respect to the amount of tonnage to which they were entitled on their specific job contracts protected by the various gypsum manufacturers, and these defendants aver that said gypsum manufacturers have continued to file from time to time information regarding specific job contracts with the agency so established through the formation of said association and aver that such action is necessary to the protection of said manufacturers.

91. Deny each and all of the averments contained in Paragraphs 108, 109 and 110 of the Complaint.

92. Deny each and all of the averments contained in Paragraph 111 of the Complaint, except that these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments

contained in the last sentence of said paragraph.

93. Deny each and all of the averments contained in Paragraph 112 of the Complaint, except that these defendants admit that defendant, United States Gypsum Company, and certain of its licensees entered into separate license agreements covering the manufacture and sale of metalized board and perforated lath, and aver that each of said separate license agreements was a bona fide license agreement entered into in good faith in order to grant to the licensee thereunder the right to manufacture a patented product embodying the inventions and improvements set forth and claimed in the patents or patent rights of defendant, United States Gypsum Company, under which said licenses were granted.

94. Deny each and all of the averments contained in Paragraph 113 of the Complaint except that these defendants admit that in the year 1934 defendant, United States Gypsum Company, offered to grant to each of its licensees a license to manufacture and sell metalized board embodying the inventions and improvements set forth and claimed, in patents and patent rights owned by said defendant and that such a license agreement was entered into with said United States Gypsum Company by American Gypsum Company, Atlantic Gypsum Products Company, Certainteed Products Corporation, Ebsary Gypsum Company, Inc., Kelley Plasterboard Company, Inc., National Gypsum Company and Universal Gypsum & Lime Company, and except that these defendants admit that the copy of the metalized board license agreement entered into with Ebsary Gypsum Company, Inc., which is set forth as Exhibit 11 in the appendix to the Complaint, is substantially identical with

each of the metalized board licenses entered into with said other licensees, and for the terms of said metalized board license agreements these defendants beg leave to refer to

the originals thereof upon the trial of this cause.

95. Deny each and all of the averments contained in Paragraph 114 of the Complaint except that these defendants aver that throughout the period from the execution of said license agreements to the date of the filing of said Complaint defendant, United States Gypsum Company, has determined the minimum prices at which each licensee might sell metalized gypsum board manufactured by it and embodying the inventions and improvements set forth and claimed in said patents and patent rights of the licensor under which said license was granted.

96. Admit the averments contained in Paragraph 115 of the Complaint except that these defendants aver that said perforated gypsum lath was, in law and in fact, covered by United States Letters Patent No. 1,938,354, owned

by said defendant, United States Gypsum Company.

97. Deny each and all of the averments contained in Paragraph 116 of the Complaint except that these 378 defendants aver that the perforated lath license agreements so proposed by the United States Gypsum Company reserved to said company the right to deter-

sum Company reserved to said company the right to determine and fix the minimum price at which any licensee thereunder might sell perforated gypsum lath manufactured by it and embodying the inventions and improvements set forth and claimed in said United States Letters Patent No. 1,938,354, and these defendants further aver that the perforated gypsum lath covered by said perforated lath license agreements also embodied inventions and improvements set forth and claimed in patents of defendant, United States Gypsum Company, which were included in the license agreements referred to in Paragraph 85 of the Complaint and therefore was subject to the minimum price provisions of those license contracts.

98. Deny each and all of the averments contained in Paragraph 117 of the Complaint except that these defendants admit that subsequent to execution of perforated lath license contracts between defendant, United States Gypsum Company, and Certain-teed Products Corporation and American Gypsum Company, similar perforated lath license agreements were entered into by said United States Gypsum Company with Ebsary Gypsum Company, Inc., and Kelley Plasterboard Company, Inc., and except that these defendants admit that a copy of the Certain-teed Products

Corporation perforated lath license agreement is set forth as Exhibit 12 in the appendix to the Complaint and is substantially identical with the perforated lath license agreements entered into with each of the other companies hereinbefore in this paragraph referred to, and for the terms of said perforated lath license agreements these defendants beg leave to refer to the originals thereof upon the trial

of this cause.

99. Deny each and all of the averments contained in Paragraph 118 of the Complaint except that they aver that by the terms of said perforated lath license agreements defendant, United States Gypsum Company, authorized its licensees to manufacture perforated lath under said patent, with the right reserved in said United States Gypsum Company to determine and fix the minimum price at which each of its licensees might sell perforated lath manufactured by such licensee and embodying the inventions and improvements set forth and claimed in said United States Letters Patent No. 1,938,354, and these defendants admit that by the terms of said license agreements each of the licensees acknowledged the validity of said patent and agreed not to contest its validity. Further answering, these defendants aver that throughout the period from the date of the execution of each such perforated lath license agreement to the month of May, 1938, defendant, United States Gypsum Company, determined the minimum price at which the licensee thereunder might sell such patented perforated lath manufactured by such licensee under said contract, and these defendants admit that the said minimum price of perforated lath so fixed was at a differential above the prices of straight lath and admit that each of such licensees sold a substantial part of the patented perforated lath manufactured by such licensee under said license at prices not less than said minimum prices so determined by said United States Gypsum Company.

100. Deny each and all of the averments contained in Paragraph 119 of the Complaint, except that these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in the first sentence of said paragraph in so far as they purport to state the information and belief as to the validity of said United States Letters Patent No. 1,938,354 of companies other than defendant, United States Gypsum Company.

101. Admit the averments contained in Paragraph 120 of the Complaint except that these defendants are without knowledge or information sufficient to form a belief as to the reason or reasons why the licensees have refrained from contesting the validity of said United States Letters Patent No. 1,938,354.

102. Deny each and all of the averments contained in

Paragraphs 121, 122 and 123 of the Complaint.

103. Deny each and every averment in the Complaint not hereinbefore admitted, qualified, explained, or specifically denied.

Wherefore, these defendants demand judgment dis-

missing the Complaint, with costs.

RICHARD H. WILMER, DOUGLAS L. HATCH,

Attorneys for Defendants United States
Gypsum Company, Sewell L. Avery and
Oliver M. Knode.

380 In the District Court of the United States [Title omitted.)]

[File endorsement omitted.]

Answer of Defendants Newark Plaster Company and Frederick Tomkins.

# Filed August 2, 1941

381 Defendants Newark Plaster Company and Frederick Tomkins answering the complaint herein as amended by an amendment filed herein on June 5, 1941:

1. Admit that the complaint was filed and these proceedings instituted under Section 4 of the Act of Congress of July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" and commonly known as the "Sherman Anti-Trust Act", but deny that they or either of them alone or in conjunction with any other defendant or defendants have violated or are now violating Section 1 of the said Sherman Anti-Trust Act as amended or Sections 2 and 3 of the said Act.

2. Deny each and every allegation in paragraphs 2, 42, 86, 93, 94, 95, 106, 108 and 109 of the complaint insofar as they refer to defendant Newark Plaster Company, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations

in the said paragraphs.

3. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 3, 7, 8, 9, 11, 13, 14, 15, 16, 17, 18, 24, 25, 31, 33, 35, 37, 49, 50, 51, 52, 53, 55 to 79, inclusive, 81, 82, 83, 84, 97, 115 and 116 of the complaint as amended.

382 • 4. Deny each and every allegation in paragraphs 4, 44, 45, 46, 47, 96, 103, 110, 121, 122 and 123 of the complaint.

5. Admit the allegations in paragraphs 5, 6, 10, 19, 27

and 105 of the complaint.

6. For the purposes of this answer adopt plaintiff's designations in paragraphs 5 to 12, inclusive, 20 and 30 of

the complaint as amended.

7. Admit that Newark operates a gypsum board plant at Kearny, New Jersey and a gypsum plaster mill at Newark, New Jersey, that U. S. G. and National operate plants in the United States and that Newark sells gypsum products manufactured by it in interstate commerce, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 20 of the complaint as amended insofar as they refer to other defendant companies and deny each and every other allegation in the said paragraph.

8. Deny that the process alleged in paragraph 21 of the complaint is the complete process in the manufacture of calcined gypsum or stucco, but admit the other allegations

in the said paragraph.

9. Admit the allegations in the first and second sentences of paragraph 22 of the complaint, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in the said paragraph.

10. Admit the allegations contained in the first and second sentences of paragraph 23 of the complaint but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other alle-

gations in the said paragraph.

11. Deny that gypsum wallboard is a substitute for plaster and lath, but admit the other allegations in paragraph

26 of the complaint.

12. Admit that the manufacture of plaster from calcined gypsum involves a relatively simple operation as compared with the manufacture of gypsum board from calcined gypsum and that the manufacture of gypsum board involves a much more complicated operation requiring expen-

sive equipment and machines, but deny that the operation of the manufacture of gypsum plaster is adequately described in paragraph 28 of the complaint and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in the said paragraph.

13. Admit that the allegations in paragraph 29 of the complaint describe generally the usual process of manufacturing gypsum board, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in the said paragraph.

14. Admit that U.S. G. and National have expanded into fields of other building materials but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations

in paragraphs 32 and 34 of the complaint.

15. Admit that Newark has a single plant for the manufacture of gypsum board and a single plant for the manufacture of gypsum plaster and that its sales in the Eastern area of gypsum board manufactured by it amounted in 1939 to approximately \$750,000, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 36 of the complaint as amended.

16. Admit that Newark has been engaged in the production of plaster since 1922, that it commenced the manufacture of gypsum board in 1939, that Kelley Plasterboard had been engaged in the production of gypsum board at a single plant for a number of years prior thereto, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other alle-

gations in paragraph 38 of the complaint.

17. Admit that Newark sells most of the gypsum board and plaster manufactured by it in interstate commerce and that Newark has generally refrained from selling said gypsum products direct to contractors, but deny each and every other allegation in paragraph 39 of the complaint insofar as they refer to Newark and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in the said paragraph.

18. Admit that gypsum products are generally transported from the plants of Newark by truck or railroad to the yards of dealers and occasionally in mixed cars or trucks, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other alle-

gations in paragraph 40 of the complaint.

19. Admit that Newark sells gypsum products produced by it in some, but not all, of the States within the Eastern area, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other

allegations in paragraph 41 of the complaint.

20. Admit that since the year 1932 no substantial amount of gypsum board or plaster has been distributed by Newark through jobbers and deny each and every other allegation in paragraph 43 of the complaint insofar as they refer to Newark and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in the said paragraph.

21. Admit that Exhibit 1 in the appendix to the complaint is a copy of United States Letters Patent No. 1,034,746, referred to as the Utzman patent, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph

48 of the complaint.

22. Deny that Kelley Plasterboard adopted the plan alleged in paragraph 54 of the complaint, and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other

allegations in the said paragraph.

23. Admit that Exhibits 4 and 5 are copies, respectively, of the so-called Hite and Haggerty patents, and beg leave to refer to the said patents for their scope, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in

paragraph 80 of the complaint.

24. Admit that under date of April 23, 1930 Kelley Plasterboard entered into a license agreement with U. S. G. but deny the allegations in paragraph 85 of the complaint insofar as they are allegations of the provisions of the said agreement between Kelley Plasterboard and U. S. G. and beg leave to refer for the provisions thereof to the original of the said agreement which will be produced upon the trial hereof, and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in the said paragraph.

the other allegations in the said paragraph.

25. Admit that sales by Kelley Plasterboard in the Eastern area of gypsum board manufactured by it amounted to approximately \$120,000 in 1929 and that U. S. G. was authorized by the said license agreement between Kelley Plasterboard and U. S. G. dated April 23, 1930, until a date 17 years after the date of issuance of patents not then

Plasterboard might sell gypsum board manufactured by Kelley Plasterboard under its said license, but deny that Kelley Plasterboard was obliged to manufacture a uniform standardized board, and that it was a party to any agreement referred to in paragraph 86 of the complaint, except the said license agreement with U. S. G. dated April 23, 1930, and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph, 87 of the complaint as amended.

26. Admit that the license agreement between Kelley Plasterboard and U. S. G. was assumed by Newark in or about 1938 and that the said license agreement is now in effect, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 88 of the complaint as amended.

27. Adopt for the purposes of the remainder of this answer plaintiff's definition in paragraph 89 of the complaint of the word "licensee", but deny the formation or existence of any combination as set forth in the said paragraph or

elcowhere in the complaint.

28. Deny each and every allegation in paragraph 90 of the complaint insofar as they refer to Newark, deny that the prices of gypsum board throughout the period from 1932 to the date of filing the complaint have been maintained at high, arbitrary and non-competitive levels and admit that U.S. G. has determined and fixed the minimum price or prices at which Kelley Plasterboard and Newark might sell gypsum board manufactured and sold by them

under the terms of the said license agreement between Kelley Plasterboard and U.S.G. and that dur-

ing the period in which said minimum prices have been so determined and fixed such gypsum board has been sold at prices not less than such minimum prices and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in the said paragraph.

29. Admit that from time to time since the execution of the said license agreement between Kelley Plasterboard and U. S. G., U. S. G. has issued to Kelley Plasterboard and Newark bulletins setting forth minimum prices and terms and conditions of sale for gypsum board manufactured under the said license agreement, that Kelley Plasterboard and

Newark have adhered thereto and that copies of certain of such bulletins are set forth as Exhibit 7 in the appendix to the complaint, but deny that the terms and provisions thereof are accurately or sufficiently described in paragraph 91 of the complaint and beg leave to refer for the provisions thereof to the said bulletins which will be produced upon the trial hereof, and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in the said

paragraph.

30. Admit that U.S. G. has required Kelley Plasterboard and Newark to make reports of all sales of board and to permit U. S. G. to audit their books, that complaints have been investigated by Board Survey Company, but deny that Newark has attended numerous meetings at which the prices and terms and conditions of sale prescribed by U. S. G. in said bulletins and at which complaints of violations by licensees of said bulletin prices were discussed for the purpose of obtaining adherence by the licensees to said bulletin prices, and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 92 of the complaint.

31. Admit that Exhibits 8, 9 and 10 in the appendix to the complaint are copies of the United States Letters Patent referred to therein, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 98 of the

complaint.

32. Admit that Exhibits 4 and 5 in the appendix to the complaint are copies of the Hite and Haggerty patents, and beg leave to refer to the said patents for their scope, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraphs 99 and 100 of the complaint.

33. Admit that during the period from October, 1935 to the date of the filing of the complaint herein Kelley Plasterboard and Newark did not produce board covered by the Hite patent, but deny each and every other allega-tion in paragraph 101 of the complaint.

34. Admit that Kelley Plasterboard did not commence using the foam process until 1938, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph

102 of the complaint.

35. Except as admitted in paragraph 18 of this answer, deny each and every allegation in paragraph 104 of the complaint insofar as they refer to Newark and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other

allegations in the said paragraph.

36. Admit that in or about the year 1936 Newark became a member of the Gypsum Statistical Institute and that from in or about the year 1936 to in or about the year 1939 Newark filed protected job contracts with the said Gypsum Statistical Institute, but deny that Newark entered into any agreement with U. S. G. and its licensees to file such contracts or to prevent by concerted action the granting by said companies to dealers of concessions described in paragraph 106 of the complaint and thereby to facilitate increases in the prices of said gypsum products and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 107 of the complaint.

37. Deny each and every allegation in paragraph 111 of the complaint, except that they allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of the last sentence of said

paragraph.

38. Admit that Kelley Plasterboard and U. S. G. entered into license agreements dated October 12, 1934 and June 23, 1937, respectively, under which U. S. G. licensed Kelley Plasterboard to manufacture and sell plasterboard having a metallized surface and perforated plasterboard lath, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the

other allegations in paragraph 112 of the complaint.

39. Admit that in 1934 U.S. G. licensed Kelley Plaster-hoard to manufacture and sell plasterboard having a metallized surface under United States Letters Patent No. 1,914,345 known as the Roos patent and that under the said agreement U.S. G. reserved the right to establish minimum prices at which Kelley Plasterboard could sell such board manufactured by it under its said license, but beg leave to refer for the provisions thereof to the original of the said agreement which will be produced upon the trial hereof and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegation in paragraph 113 of the complaint.

40. Admit that U.S.G. has determined and fixed mini-

mum prices and terms and conditions of sale governing the sale by its licensees of metallized board, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in

paragraph 114 of the complaint.

41. Admit that Kelley Plasterboard entered into an agreement with U.S. G. dated June 23, 1937, a copy of which will be produced at the trial hereof, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 117 of the complaint.

387 42. Admit that by the terms of the said agreement with Kelley Plasterboard U. S. G. authorized Kelley Plasterboard to manufacture perforated lath under the said patent and that U. S. G. reserved the right to establish minimum prices at which Kelley Plasterboard could sell such lath, but beg leave to refer for the provisions thereof to the original of the said agreement which will be produced upon the trial hereof and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 118 of the complaint.

43. Deny the allegation that the said license agreement between Kelley Plasterboard and U. S. G. was not a bona fide patent license agreement and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph

119 of the complaint.

44. Admit that Newark has not contested the validity of the perforated gypsum lath patent, but allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in paragraph 120 of the complaint.

45. Deny each and every allegation in the complaint not

hereinbefore admitted or specifically denied.

Wherefore, defendants pray that the complaint be dismissed as to them.

Fulton Brylawski,
Fulton Brylawski,
Attorney for Defendants,
Newark Plaster Company

Attorney for Defendants, Newark Plaster Company and Frederick Tomkins.

BENJAMIN P. DEWITT,

Counsel.

In the District Court of the United States
[Title omitted.]

[File endorsement omitted.]

Expediting certificate
Filed December 16, 1941

To the Clerk of Said Court:

I, Francis Biddle, Attorney General of the United States, hereby certify that the above-entitled cause, now pending in said court, is a civil action brought by the United States against United States Gypsum Company and other defendants named in the complaint therein, under the Act of Congress entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 (26 Stat. 209), and that said action is, in my opinion, a case of general public importance.

I therefore request that, complying with the provisions of the Act of Congress entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved February 11, 1903 (32 Stat. 823), as amended by the Act of Congress approved June 25, 1910 (36 Stat. 854), you will file this certificate among the records of the above-entitled cause,

and immediately furnish a copy thereof to each of the Justices of the Court of Appeals for the District of Columbia, to the end that said case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day before not less than three of the Justices of said Court of Appeals, as provided in said Act of February 11, 1903, as amended.

Francis Biddle, Francis Biddle, Attorney General.

WASHINGTON, D. C., December 5, 1941.

GRANT W. KELLEHER,

By A. KARSTED,

Department of Justice, Washington, D. C.

390 In the United States Court of Appeals for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Designation of judges pursuant to the provisions of Sec. 28, Title 15, U. S. Code

Filed September 17, 1942

The Attorney General having filed an expediting certificate in the District Court of the United States for the District of Columbia in the above entitled cause, pursuant to the provisions of Section 28 of Title 15 of the Code of Laws of the United States of America; now, therefore, pursuant to the authority vested in me by said section (15 U.S.C. Sec. 28, as amended by the Act of April 6, 1942, Pub. No. 515, 77th Congress), I do hereby designate the Honorable Harold M. Stephens, Associate Justice of the United States Court of Appeals for the District of Columbia, and the Honorable Finis J. Garrett and the Honorable Oscar E. Bland, heretofore designated to perform the duties of district judges in the District Court of the United States for the District of Columbia, to hear and determine the above entitled case.

Dated September 15, 1942.

Chief Justice of the United States

Court of Appeals for the

District of Columbia.

391 In the District Court of the United States for the District of Columbia

[Title omitted.]

[File endorsement omitted.]

Motion by defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode for lcave to file supplemental answer

Filed October 15, 1942

Defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, by their attorneys named below, and upon the annexed affidavit of Bruce Bromley sworn to October 14, 1942, and upon all the proceedings herein, hereby respectfully move this Court for an order permitting them to serve a supplemental answer, a copy of which is annexed to the aforesaid affidavit of Bruce Bromley.

Dated: October 14, 1942.

RICHARD H. WILMER,
BRUCE BROMLEY,
Attorneys for Defendants, United States
Gypsum Company, Sewell L. Avery and
Oliver M. Knode, 616-621 Transportation
Building, Washington, D. C.

392

In the District Court of the United States

[Title omitted.) ]

[File endorsement omitted.]

Defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, supplementing their answer filed herein on August 1, 1941, and further answering the Complaint as amended, allege:

For a first affirmative defense:

104. On June 28, 1940, an indictment was returned in the District Court of the United States for the District of Columbia against defendants United States Gypsum Company, National Gypsum Company, Certain-teed Products Corporation, Ebsary Gypsum Company, Inc., Newark Plaster Company, Oliver M. Knode, Melvin H. Baker and others. A copy of said indictment is annexed hereto as Exhibit A and made a part hereof.

105. The defendants named in said indictment pleaded not guilty to the matters therein charged and, subsequent to the filing of the original answer herein of defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, the defendants named in said indict-

ment (except Warren Henley who died prior to the 393 trial), were tried thereon before the District Court and a jury from October 13, 1941, to November 20,

1941.

106. On November 20, 1941, after the Government had presented its evidence and rested, the District Court found on the merits that there was no evidence of a conspiracy and directed the jury to find a verdict of not guilty as to all defendants on each count of said indictment and, pursuant to said direction, the jury unanimously found each of the defendants not guilty on each count of said indictment. A copy of the judgment of the District Court entered upon said verdict is annexed hereto as Exhibit B and made a part hereof.

107. The alleged combination and conspiracy referred to in said indictment is the same alleged combination and conspiracy which is alleged in the Complaint, as amended

herein.

108. At all times mentioned in said indictment and in the complaint, as amended herein, defendant herein Sewell L. Avery, was President or Chairman of the Board of Directors of United States Gypsum Company. All of the matters alleged in the complaint herein with respect to Sewell L. Avery relate to his acts as President or Chairman of the Board of United States Gypsum Company. Said Sewell L. Avery therefore was and is in privity with said United States Gypsum Company with respect to all matters mentioned in said indictment and in said complaint relating to said company.

109. The adjudication of the District Court and the judgment of acquittal rendered in favor of the defendants in said criminal cause as hereinabove set forth are res judi-

cata and said judgment is a bar to the maintenance

394 of this suit.

For a second affirmative defense:

110. Repeat each and all of the averments contained in paragraphs 104, 105, 106 and 108 of this supplemental answer with the same force and effect as if they were set

forth here in full.

111. Upon the trial on said indictment the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act by establishing, fixing, maintaining and making uniform and non-competitive the resale prices, terms and conditions of sale (hereinafter referred to as "prices") of gypsum board of manufacturing distributors, were adjudged to be without merit.

112. Upon the trial on said indictment the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act (a) by requiring and coercing manufacturing distributors to maintain and adhere to the aforesaid prices in reselling gypsum board; (b) by agreeing to sell gypsum board to manufacturing distributors at a discount only upon the condition that such prices were maintained and adhered to; (c) by requiring manufacturing distributors, as a condition of sale, to agree, and by so agreeing; to resell gypsum board at such prices; (d) by notifying manufacturing distributors of such prices; (e) by investigating and policing sales of gypsum board of manufacturing distributors at variance with such prices; (f) by holding meetings at

which sales of gypsum board by manufacturing dis-395 tributors at variance with such prices were discussed and at which it was agreed that such sales would be investigated and such manufacturing distributors would be induced to maintain and adhere to the said prices; (g) by notifying the manufacturing distributors of their alleged sales of gypsum board at prices at variance with such prices for the purpose and with the effect of warning the manufacturing distributors that they must adhere to such prices in order to continue to purchase gypsum board;
(h) by discontinuing to sell gypsum board to manufacturing distributors who failed to maintain and adhere to such prices; and (i) by refusing to permit sales of gypsum board to companies selling gypsum products at wholesale because of the reputation of those companies for selling gypsum products below market prices, were adjudged to be without merit.

113. Upon the trial on said indictment, the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act by refraining from distributing gypsum board through jobbers, by refusing to sell gypsum board to jobbers at a discount and by eliminating jobbers from the distribution of gyp-

sum board, were adjudged to be without merit.

114. Upon the trial on said indictment the license agreements referred to therein and the minimum prices at which licensees might sell patented gypsum board manufactured by them under such agreements, including the terms and conditions of sale, were adjudged to be valid and lawful.

115. Upon the trial on said indictment it was adjudged that the defendants therein named did not violate the

Sherman Act, that the combination and conspiracy 396 charged did not exist, that there was no evidence of an illegal combination or conspiracy and that the defendants' conduct was entirely lawful.

116. The matters referred to in paragraphs 111, 112, 113 and 114 of this supplemental answer are repeated in the

Complaint, as amended herein.

117. By virtue of the adjudication of the District Court and the judgment of acquittal so rendered in favor of the defendants in said criminal cause as hereinabove set forth, the matters referred to in paragraphs 111, 112, 113, 114 and 115 of this supplemental answer are res judicata and plaintiff is estopped to relitigate them in this suit.

Wherefore, defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode demand judgment dis-

missing the Complaint, with costs.

RICHARD H. WILMER, BRUCE BROMLEY,

Attorneys for Defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode. Exhibit "A" to Supplemental Answer 397 In the District Court of the United States
For the District of Columbia

Holding & Criminal Term April Term, 1940 Criminal No. 66008

## UNITED STATES OF AMERICA

v.

UNITED STATES GYPSUM COMPANY ET AL., DEFENDANTS Returned June 28, 1940

UNITED STATES OF AMERICA, District of Columbia, ss:

#### - INDICTMENT

The Grand Jurors of the United States of America, duly impaneled, sworn, and charged, at a regular term, to wit: the April 1940 term, in the District Court of the United States for the District of Columbia, as an additional grand jury inquiring for said District at said term of said Court, upon their oaths do find and present as follows:

398 COUNT I

# A. THE DEFENDANTS AND OTHER PARTIES TO THE CONSPIRACY

1. The following named corporations, engaged in the manufacture and sale of gypsum board and plaster, are hereby made defendants herein. Each of said corporations is authorized to do business under and by virtue of the laws of the state of incorporation as indicated, and has its principal place of business as indicated. Each will sometimes be referred to hereinafter by the abbreviated name as indicated:

Name of corporation	Abbreviated name	incorporation State of	Principal place of business
United States Gypsum Co. National Gypsum Co. Certain-teed Products Corp. Ebsary Gypsum Co., Inc. Newark Plaster Co.	U.S.G. National Certain-teed Ebsary Newark	Illinois Chicago, Ill. Delaware Buffalo, N. Maryland New York, N. New York New Jersey Newark, N.	

2. The following named corporations, formerly engaged in the manufacture and sale of gypsum board and plaster during part of the period covered by this indictment, are hereby named as co-conspirators with the defendants in the combination and conspiracy hereinafter alleged, but not as defendants herein. Each of said corporations had its principal place of business as indicated, and the assets of

each were acquired, during the period covered by this indictment, by the corporation as indicated:

Name of corporation	Principal place of business	Corporation by which acquired
Universal Gypsum & Lime Co. Atlantic Gypsum Products Co. The American Gypsum Co. Kelley Plasterboard Co., Inc.	Chicago, Ill. Portsmouth, N. H. Port Clinton, Ohio Delawanna, N. J.	National do The Celotex Corp. Newark

- 3. The corporations named in paragraphs 1 and 2 hereon will sometimes be referred to hereinafter as manufacturers.
- 4. The following named corporations, some of which were engaged in the manufacture and sale of gypsum plaster and all of which were engaged in the wholesale distribution, but not in the manufacture of gypsum board, are hereby named as co-conspirators with the defendants in the combination and conspiracy hereinafter alleged, but not as defendants herein. Each of said corporations has (or had) its principal place of business as indicated:

Name of corporation	Principal place of business
Structural Gypsum Corp. American Cyanamid & Chemical Corp. Connecticut Adamat Plaster Co. Oakfield Gypsum Products Corp. Mathieson Alkali Works, Inc. The Calvin Tomkins Co. Grand Rapida Plaster Co. Michigan Gypsum Co. The Alabastine Co. Wasem Plaster Co. Wasem Plaster Co. Waliboard Wholesalers, Inc. Plastergon Waliboard Co.	Linden, N. J. New York, N. Y. New Haveen, Conn. Oakfield, N. Y. New York, N. Y. do Grand Rapids, Mich. do fort Dodge, Iowa Brooklyn, N. Y. Buffalo, N. Y.

Said corporations will sometimes be referred to hereinafter as distributors.

5. The following named individuals are hereby made defendants herein, each having the business address and being (or having been) associated with the corporate manufacturers as indicated and having (or having had) the official position therewith as indicated. Said individual defendants were, within three years prior to the presentation of this indictment, actively engaged in the management, direction, and control of the affairs and policies of their respective corporations, particularly those affairs and policies of said corporations described in this indictment, and have authorized, ordered, or done the acts charged to be illegal by this indictment.

Name	Business address	Company with which associated	Official position
Oliver M. Knode	300 W. Adams St., Chi- eago, Ill. 300 W. Adams St., Chi-	U.S.G	President
William L. Keady	cago, Ill.	do	Vice President in
H. Frank Sadler	300 W. Adams St., Chi- cago, Ill.	do	Charge of Sales Assistant to Vice President in
Sidney F. Bartlett .	300 W. Adams St., Chi-	do	Charge of Sales District Sales Man-
Ernest A. Gallagher.	80 Rockefeller Plaza, New York, N. Y.	do	Regional Manager
Melvin H. Baker	192 Delaware Ave., Buf- falo, N. Y. 192 Delaware Ave., Buf-	Netional	President
Ralph F. Buzley	falo, N. Y	do	Vice President in Charge of Sales
warren F. Henley .	cago, Ill.	Certain-teed	Merchandise Man-
Arthur R. Black	Port Clinton, Ohio	can Gyp- sum Co.	ager, Gypsum Division Sales Manager

# B. THE NATURE OF THE TRADE AND COMMERCE INVOLVED IN THIS INDICTMENT

6. Gypsum is a mineral composed of calcium sulphate in combination with water and found in deposits in many of the states of the United States and in Canada. When said mineral is crushed and the water is removed by evaporation, the resulting product, known as calcined gypsum, has the characteristic of readily recombining with water to form a hard, rigid mass. Various products of calcined gypsum, such as plaster and board, are widely used in the building

construction industry.

7. Gypsum board is one of the most important products of calcined gypsum. Said board consists of a flat, thin core of hardened calcined gypsum covered on both surfaces with heavy paper. Gypsum board may be lath, plasterboard, or wallboard, depending, principally, upon the size of the board and the quality of paper with which it is covered. Gypsum lath and plasterboard are used support plaster in wall and ceiling structures. Said gypsum lath and plasterboard constitute approximately 50% of all products used as a support for plaster in all such structures and over 90% of all products used as a support for plaster in wall and ceiling structures in residential buildings. Gypsum wallboard is larger than lath and plasterboard and is covered with a better quality paper than that covering lath and plasterboard. Said wallboard is used as a substitute for plaster and lath in non-fireproof wall and ceiling structures and is one of the most important substitutes for plaster and lath used in such structures. Said gypsum wallboard

became commercially important during the World
War of 1914-1918, principally because of its extensive use by the Government of the United States in

the construction of barracks and other temporary structures necessary for military purposes. The existing national emergency may substantially increase the demand of the Government for gypsum wallboard for similar mili-

tary purposes.

8. The manufacturers named as defendants and co-conspirators herein were engaged, during the period covered by this indictment, in the production of gypsum board at plants located throughout the United States and in the sale of said gypsum board. Said manufacturers produced and sold substantially all of the gypsum board manufactured and sold in the United States east of the Rocky Mountains, and U.S.G. manufactured and sold over 50% of said gypsum board.

9. The greater part of said gypsum board was sold by said manufacturers, in interstate commerce and in commerce between the states and the District of Columbia, to building material dealers and consumers. A substantial part of the gypsum board produced by said manufacturers as aforesaid was sold in interstate commerce to the distributors named as co-conspirators herein at a discount below

the manufacturers' price to dealers.

10. Said distributors resold said gypsum board in interstate commerce to building material dealers and consumers within most of the states east of the Rocky Mountains, including the states of Maryland, Virginia, North Carolina, South Carolina, Georgia, West Virginia, Kentucky, Tennessee, Arkansas, and Mississippi, and in commerce between the states and the District of Columbia to dealers

and consumers within the District of Columbia. In so selling to said dealers and consumers, said distributors competed with one or more of said manu-

facturers.

### C. THE PATENT LICENSE AGREEMENTS

11. During the years 1929 and 1930, U.S.G. entered into separate and substantially identical license agreements with each of the other manufacturers, except Newark. In January, 1939, Newark assumed, and agreed to be bound by, the license agreement of Kelley Plasterboard Company, Inc. The manufacturers, except those named as co-conspirators herein, have been bound by said license agreements from the date of their execution until the date of the presentation of this indictment. By virtue of said agreements, the manufacturers agreed as follows, that is to say: U.S.G. purported to license each of the other manufacturers to manufacture and sell gypsum board under patents owned by

U.S.G., purporting to cover an improved gypsum board and processes, methods, and machines for the manufacture thereof. U.S.G. reserved the right to determine and fix the minimum prices and other terms and conditions governing the sale by manufacturers of gypsum board manufactured by them under said license agreements, and the manufacturers agreed to abide by said minimum prices and other terms and conditions in the sale of gypsum board manufactured by them under said license agreements. Each of the manufacturers agreed to refrain from selling gypsum board manufactured by it under said license agreements to jobbers, manufacturers, and wholesale distributors, except with the written consent of U.S.G.

12. Pursuant to said license agreements, U.S.G. has, throughout the period covered by this indictment, determined and fixed the minimum prices and other

terms and conditions governing the sale by manufacturers of substantially all of the gypsum board produced by the manufacturers. U.S.G. has, from time to time throughout said period, circulated among the other manufacturers numerous bulletins setting forth said minimum prices and other terms and conditions of sale. The manufacturers have, throughout the period during which they were bound by their license agreements, sold substantially all of the gypsum board manufactured by them on the basis of the minimum prices and other terms and conditions of sale set forth in said bulletins. The minimum prices and other terms and conditions governing sales by the manufacturers to dealers and consumers and determined and fixed by U.S.G. as aforesaid will sometimes be referred to hereinafter as U.S.G. dealer prices.

#### D. THE CONSPIRACY

13. Beginning in the year 1929, the exact date being to the Grand Jurors unknown, and continuing to the date of the presentation of this indictment, the defendants and the corporations hereinbefore named as co-conspirators, herein, and others to the Grand Jurors unknown, have been continuously engaged in a wrongful and unlawful combination and cospiracy in restraint of the aforesaid trade and commerce in gypsum board between the states and the District of Columbia, in violation of Section 3 of the Act of Congress of July 2, 1890, known as the Sherman Act, that is to say:

14. Throughout the period of time aforesaid, the manufacturers, including each of the defendant corporations,

and the distributors acting, in part, through the individuals named as defendants herein, were engaged, within the District of Columbia, in an unlawful combination and conspiracy to establish, fix, and make uniform and non-competitive the distributors' resale prices to dealers and consumers (including the various terms and conditions of sale) for gypsum board purchased from the manufacturers by the distributors and resold by the distributors in commerce between the states and the District of Columbia as aforesaid. Pursuant to said combination and conspiracy and in furtherance of the objectives thereof, the distributors have resold said gypsum board, in commerce between the states and the District of Columbia, to dealers and consumers within the District of Columbia at the prices and on the terms and conditions of sale so established, fixed, and made uniform and non-competitive. Said combination and conspiracy has been effectuated in the manner and by the means as follows, that is to say:

15. As a condition for the consent of U.S.G. to sales of gypsum board to the distributors by the manufacturers at a discount below U.S.G. dealer prices, U.S.G. required that the distributors maintain, and adhere to, U.S.G. dealer prices in reselling said board to dealers and consumers. The manufacturers agreed among themselves to sell gypsum board to the distributors at a discount below U.S.G. dealer prices only on condition that the distributors maintain and adhere to, U.S.G. dealer prices in reselling said board to dealers and consumers. The manufacturers required the distributors as a condition of sale to agree, and the distributors so agreed, to resell at U.S.G. dealer prices gypsum board purchased from the manufacturers. Pursuant to

said agreements, the manufacturers from time to 406 time advised the distributors of U.S.G. dealer prices and of changes therein and the distributors resold gypsum board to dealers and consumers at said prices.

16. The manufacturers and the distributors investigated and policed sales of gypsum board by the distributors and reported to U.S.G., and among themselves, sales by the distributors at prices, or on terms or conditions, at variance with U.S.G. dealer prices. Throughout the period of the conspiracy, the manufacturers held numerous meetings at which sales by the distributors at prices, or on terms or conditions, at variance with U.S.G. dealer prices were discussed and at which the supplying manufacturers agreed to investigate said sales and to induce the distributors making said sales to maintain, and adhere to, U.S.G. dealer prices.

17. From time to time during the period of the conspiracy, the manufacturers notified the distributors of alleged sales of gypsum board by the distributors at prices, or on terms or conditions, at variance with U.S.G. dealer prices for the purpose, and with the effect, of warning the distributors that they must maintain, and adhere to, U.S.G. dealer prices in order to continue to purchase gypsum board from the manufacturers. In some instances, manufacturers discontinued the sale of gypsum board to distributors because of the failure of said distributors to maintain, and adhere to, U.S.G. dealer prices in sales of gypsum board by said distributors.

18. Pursuant to said combination and conspiracy, U.S.G. refused to permit manufacturers to sell, and manufacturers refused to sell, gypsum board to companies selling

407 gypsum products at wholesale, other than those named as co-conspirators herein, because of the reputation of said companies for selling gypsum products at prices below prevailing market prices.

## E. EFFECTS OF THE COMBINATION AND CONSPIRACY

19. By carrying out the combination and conspiracy hereinbefore described, the defendants have directly, substantially, and unreasonably restrained the aforesaid trade
and commerce in gypsum board; have exacted arbitrary
and non-competitive prices for gypsum board from dealers
and consumers purchasing from distributors as aforesaid
and have prevented and restrained free and active competition in the distribution of gypsum board by distributors as
aforesaid.

## F. JURISDICTION AND VENUE

20. The combination and conspiracy herein set forth has operated and has been carried out in part within the District of Columbia. In pursuance of said combination and conspiracy and in furtherance of the objectives thereof, some of the distributors named as co-conspirators herein, within three years prior to the presentation of this indictment, (a) have contracted to sell, have sold, and have delivered large quantities of gypsum board to dealers and consumers within the District of Columbia at the prices and on the terms and conditions of sale so determined, fixed, and made uniform and non-competitive as aforesaid, (b) have solicited orders for gypsum board from dealers and consumers within the District of Columbia at said prices and on said terms and conditions of sale, and (c) have cir-

culated among dealers and consumers within the District of Columbia numerous bulletins and lists quoting said prices, terms, and conditions of sale.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do find and present that defendants, throughout the period aforesaid, at the places, and in the manner and form aforesaid, unlawfully have engaged in a continuing combination and conspiracy in restraint of the aforesaid trade and commerce between the states and the District of Columbia, contrary to the statute in such case made and provided, and against the peace and dignity of the United States of America.

# COUNT II

21. Paragraphs 1 to 12, inclusive, of Count I of this indictment are hereby realleged and incorporated herein as if hereinafter set forth in full.

## D. THE CONSPIRACY

22. Beginning in the year 1929, the exact date being to the Grand Jurors unknown, and continuing to the date of the presentation of this indictment, the defendants and the corporations hereinbefore named as co-conspirators herein, and others to the Grand Jurors unknown, have been continuously engaged in a wrongful and unlawful combination and conspiracy in restraint of the aforesaid trade and commerce in gypsum board between the states and the District of Columbia, in violation of Section 3 of the Act of Congress of July 2, 1890, known as the Sherman Act, that is to say:

23. Throughout the period of time aforesaid, the manufacturers, including each of the defendant corporations, and the distributors acting, in part, through

the individuals named as defendants herein, were engaged, within the District of Columbia, in an unlawful combination and conspiracy to establish, fix, and make uniform and non-competitive the distributors' resale prices to dealers and consumers (including the various terms and conditions of sale) for gypsum board purchased by the distributors from the manufacturers and resold by the distributors in interstate commerce and in commerce between the states and the District of Columbia as aforesaid. Pursuant to said combination and conspiracy and in furtherance of the objectives thereof, the distributors have resold said gypsum board in interstate commerce to dealers and consumers within most of the states east of the Rocky Mountains, and in commerce between the states and the District of Columbia to dealers and consumers within the District of Columbia, at the prices and on the terms and conditions of sale so established, fixed, and made uniform

and non-competitive. Said combination and conspiracy has been effectuated in the manner and by the means as follows,

that is to say:

24. As a condition for the consent of U.S.G. to sales of gypsum board to the distributors by the manufacturers at a discount below U.S.G. dealer prices, U.S.G. required that the distributors maintain, and adhere to, U.S.G. dealer prices in reselling said board to dealers and consumers. The manufacturers agreed among themselves to sell gypsum board to the distributors at a discount below U.S.G. dealer prices only on condition that the distributors maintain, and adhere to, U.S.G. dealer prices in reselling said

board to dealers and consumers. The manufacturers

10 required the distributors as a condition of sale to
agree, and the distributors so agreed, to resell at

U.S.G. dealer prices gypsum board purchased from the
manufacturers. Pursuant to said agreements, the manufacturers from time to time advised the distributors of

U.S.G. dealer prices and of changes therein and the distributors resold gypsum board to dealers and consumers at

said prices.

25. The manufacturers and the distributors investigated and policed sales of gypsum board by the distributors and reported to U.S.G., and among themselves, sales by the distributors at prices, or on terms or conditions, at variance with U.S.G. dealer prices were discussed and at which the supplying manufacturers agreed to investigate said sales and to induce the distributors making said sales to main-

tain, and adhere to, U.S.G. dealer prices.

26. From time to time during the period of the conspiracy, the manufacturers notified the distributors of alleged sales of gypsum board by the distributors at prices, or on terms or conditions, at variance with U.S.G. dealer prices for the purpose, and with the effect, of warning the distributors that they must maintain, and adhere to, U.S.G. dealer prices in order to continue to purchase gypsum board from the manufacturers. In some instances, manufacturers discontinued the sale of gypsum board to distributors because of the failure of said distributors to maintain, and adhere to, U.S.G. dealer prices in sales of gypsum board by said distributors.

27. Pursuant to said combination and conspiracy, U.S.G. refused to permit manufacturers to sell, and manufacturers refused to sell, gypsum board to companies

411 selling gypsum products at wholesale, other than those named as co-conspirators herein, because of the

reputation of said companies for selling gypsum products at prices below prevailing market prices.

E. EFFECTS OF THE COMBINATION AND CONSPIRACY

28. By carrying out the combination and conspiracy hereinbefore described, the defendants have directly, substantially, and unreasonably restrained the aforesaid trade and commerce in gypsum board; have exacted arbitrary and non-competitive prices for gypsum board from dealers and consumers purchasing from distributors as aforesaid; and have prevented and restrained free and active competition in the distribution of gypsum board by distributors as aforesaid.

F. JURISDICTION AND VENUE

29. The combination and conspiracy herein set forth has operated and has been carried out in part within the District of Columbia. In pursuance of said combination and conspiracy and in furtherance of the objectives thereof, some of the distributors named as co-conspirators herein, within three years prior to the presentation of this indictment, (a) have contracted to sell, have sold, and have delivered large quantities of gypsum board to dealers and consumers within the District of Columbia at the prices and on the terms and conditions of sale so determined, fixed, and made uniform and non-competitive as aforesaid, (b) have solicited orders for gypsum board from dealers and consumers within the District of Columbia at said prices

and on said terms and conditions of sale, and (c)
have circulated among dealers and consumers within
the District of Columbia numerous bulletins and
lists quoting said prices, terms, and conditions of sale.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do find and present that defendants, throughout the period aforesaid, at the places, and in the manner and form aforesaid, unlawfully have engaged in a continuing combination and conspiracy in restraint of the aforesaid trade and commerce between the states and the District of Columbia, contrary to the statute in such case made and previded, and against the peace and dignity of the United States of America.

#### COUNT III

30. Paragraphs 1 to 12, inclusive, of Count I of this indictment are hereby realleged and incorporated herein as if hereinafter set forth in full.

31. Throughout the period of the combination and conspiracy hereinafter alleged, dealers within the District of

Columbia were in competition with dealers within the states of Maryland and Virginia in the resale to consumers of gypsum products, including gypsum board, purchased from manufacturers and distributors. By reason of said competition, prices for gypsum products to dealers within the states of Maryland and Virginia fluctuated directly with prices for gypsum products to dealers within the District of Columbia, and a reduction in the price of gypsum products to dealers in the District of Columbia was almost invariably accompanied by a reduction in prices of gypsum

products to dealers within the states of Maryland and Virginia. Dealers in gypsum products, including gypsum board, within the states of Maryland, Virginia, North Carolina, South Carolina, Georgia, Kentucky, Tennessee, Arkansas, and Mississippi, were served by one or more of the distributors from sales offices located in the District of Columbia.

## D. THE CONSPIRACY

32. Beginning in the year 1929, the exact date being to the Grand Jurors unknown, and continuing to the date of the presentation of this indictment, the defendants and the corporations hereinbefore named as co-conspirators herein, and others to the Grand Jurors unknown, have been/continuously engaged in a wrongful and unlawful combination and conspiracy in restraint of the aforesaid trade and commerce in gypsum board among the states, in violation of Section 1 of the Act of Congress of July 2, 1890, known as the Sherman Act, as amended by the Act of August 17, 1937, that is to say:

33. Throughout the period of time aforesaid, the manufacturers, including each of the defendant corporations, and the distributors, acting, in part, through the individuals named as defendants herein, were engaged, within the District of Columbia, in an unlawful combination and conspiracy to establish, fix, and make uniform and noncompetitive the distributors' resale prices to dealers and consumers (including the various terms and conditions of sale) for gypsum board purchased from the manufacturers by the distributors and resold by the distributors in interstate commerce and in commerce between the states and

the District of Columbia as aforesaid. Pursuant to said combination and conspiracy and in furtherance of the objectives thereof, the distributors have resold said gypsum board in interstate commerce to dealers and consumers within most of the states east of the Rocky Mountains, including the states of Maryland, Virginia, North Carolina, South Carolina, Georgia, West Virginia, Kentucky, Tennessee, Arkansas, and Mississippi, and in commerce between the states and the District of Columbia to dealers and consumers within the District of Columbia, at the prices and on the terms and conditions of sale so established, fixed, and made uniform and non-competitive. Said combination and conspiracy has been effectuated in the

manner and by the means as follows, that is to say:

34. As a condition for the consent of U.S.G. to sales of gypsum board to the distributors by the manufacturers at a discount below U.S.G. dealer prices, U.S.G. required that the distributors maintain, and adhere to, U.S.G. dealer prices in reselling said board to dealers and consumers. The manufacturers agreed among themselves to sell gypsum board to the distributors at a discount below U.S.G. dealer prices only on condition that the distributors maintain, and adhere to, U.S.G. dealer prices in reselling said board to dealers and consumers. The manufacturers required the distributors as a condition of sale to agree, and the distributors so agreed, to resell at U.S.G. dealer prices gypsum board purchased from the manufacturers. Pursuant to said agreements, the manufacturers from time to time advised the distributors of U.S.G. dealer prices and of changes therein, and the distributors resold gypsum board to dealers and consumers at said prices.

415 35. The manufacturers and the distributors investigated and policed sales of gypsum board by the distributors and reported to U.S.G., and among themselves, sales by the distributors at prices, or on terms or conditions, at variance with U.S.G. dealer prices. Throughout the period of the conspiracy, the manufacturers held numerous meetings at which sales by the distributors at prices, or on terms or conditions, at variance with U.S.G. dealer prices were discussed and at which the supplying manufacturers agreed to investigate said sales and to induce the distributors making said sales to maintain, and

adhere to, U.S.G. dealer prices.

36. From time to time during the period of the conspiracy, the manufacturers notified the distributors of alleged sales of gypsum board by the distributors at prices, or on terms or conditions, at variance with U.S.G. dealer prices for the purpose, and with the effect, of warning the distributors that they must maintain, and adhere to, U.S.G. dealer prices in order to continue to purchase gypsum board from the manufacturers. In some instances, manufactur-

ers discontinued the sale of gypsum board to distributors because of the failure of said distributors to maintain, and adhere to, U.S.G. dealer prices in sales of gypsum board

by said distributors.

37. Pursuant to said combination and conspiracy, U.S.G. refused to permit manufacturers to sell, and manufacturers refused to sell, gypsum board to companies selling gypsum products at wholesale, other than those named as co-conspirators herein, because of the reputation of said companies for selling gypsum products at prices below prevailing market prices.

# 416 E. EFFECTS OF THE COMBINATION AND CONSPIRACY

38. By carrying out the combination and conspiracy hereinbefore described, the defendants have directly, substantially, and unreasonably restrained the aforesaid trade and commerce in gypsum board; have exacted arbitrary and non-competitive prices for gypsum board from dealers and customers purchasing from distributors as aforesaid; and have prevented and restrained free and active competition in the distribution of gypsum board by distributors as aforesaid.

### F. JURISDICTION AND VENUE

39. The combination and conspiracy herein set forth has operated and has been carried out in part within the District of Columbia. In pursuance of said combination and conspiracy and in furtherance of the objectives thereof, some of the distributors named as co-conspirators herein. within three years prior to the presentation of this indictment, (a) have contracted to sell, have sold, and have delivered large quantities of gypsum board to dealers and consumers within the District of Columbia at the prices . and on the terms and conditions of sale determined, fixed, and made uniform and non-competitive as aforesaid, (b) have solicited orders for gypsum board from dealers and consumers within the District of Columbia at said prices and on said terms and conditions of sale, (c) have circulated among dealers and consumers within the District of Columbia numerous bulletins and lists quoting said prices, terms and conditions of sale, (d) have contracted to sell,

have sold, and have delivered, through sales offices located in the District of Columbia, large quantities of gypsum board to dealers and consumers within the states of Maryland, Virginia, North Carolina, South Carolina, Georgia, West Virginia, Kentucky, Tennessee, Arkansas, and Mississippi, at said prices and on said terms and conditions of sale, (e) have solicited and have transmitted, through sales offices located in the District of Columbia, orders for gypsum board from dealers and consumers within the states of Maryland, Virginia, North Carolina, South Carolina, Georgia, West Virginia, Kentucky, Tennessee, Arkansas, and Mississippi, at said prices and on said terms and conditions of sale, and (f) have circulated, from sales offices located in the District of Columbia, among dealers and consumers within the states of Maryland, Virginia, North Carolina, South Carolina, Georgia, West Virginia, Kentucky, Tennessee, Arkansas, and Mississippi, numerous bulletins and lists quoting said prices, terms and conditions of sale.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do find and present that defendants, throughout the period aforesaid, at the places, and in the manner and form aforesaid, unlawfully have engaged in a continuing combination and conspiracy in restraint of the aforesaid trade and commerce among the several states, contrary to the statute in such case made and provided, and against the peace and dignity of the United States of America.

GRANT W. KELLEHER,
Special Assistant to the Attorney General.

GEORGE B. HADDOCK,
EDWARD J. HICKEY, JR.,
GEORGE N. WISE,
ROBERT R. REYNOLDS, JR.,
ARTHUR S. CLARK, JR.,
Special Attorneys.

THURMAN ARNOLD,
Assistant Attorney General.

EDWARD M. CURRAN, United States Attorney.

: 418

Exhibit "B" to supplemental answer

WEDNESDAY, NOVEMBER 19TH, A. D. 1941

The court resumes its session pursuant to adjournment: Mr. Justice Goldsborough, presiding.

No. 66008

Indicted for Vio. Secs. 1 and 3, Act of Congress July 2, 1890, known as the Sherman Anti-trust Act, 15 U.S.C.A., Secs. 1 and 3

## UNITED STATES

v.

UNITED STATES GYPSUM CO., NATIONAL GYPSUM CO., CERTAIN-TEED PRODUCTS CORPORATION, EBSARY GYPSUM CO., INC., NEWARK PLASTER CO., OLIVER M. KNODE, WILLIAM L. KEADY, H. FRANK SADLER, SIDNEY F. BARTLETT, ERNEST A. GALLAGHER, MELVIN H. BAKER, RALPH F. BURLEY, ARTHUR R. BLACK

Come again the parties aforesaid, in manner as aforesaid and the same jury that was respited in this case yesterday; whereupon the said jury upon their oath and by direction of the Court say that each defendant is not guilty on the first, second, and third counts of the indictment; and thereupon it is considered by the Court that each defendant go thereof without day.

420 In the District Court of the United States [Title omitted.]

[File endorsement omitted.]

419

Motion by defendants Certain-teed Products Corporation and Henry J. Hartley for leave to file supplemental answer.

Filed October 19, 1942

Defendants Certain-teed Products Corporation and Henry J. Hartley, by their attorneys named below, and upon the annexed affidavit of F. W. H. Adams, sworn to October 18, 1942, and upon all the proceedings herein, hereby respectfully move this Court for an order permitting them to serve a supplemental answer, a copy of which is annexed to the aforesaid affidavit of F. W. H. Adams. Dated October 18, 1942.

HAROLD G. McGUIRE, 1026 17th St., N. W., Washington, D. C.,

F. W. H. ADAMS,

44 Wall Street, New York City, N. Y.,

Attorneys for Defendants, Certain-teed Products Corporation and Henry J. Hartley. 421

In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Defendants Certain-teed Products Corporation and Henry J. Hartley, supplementing their answers filed herein on August 1, 1941, and further answering the Complaint as amended, allege:

For a first affirmative defense:

1. On June 28, 1940, an indictment was returned in the District Court of the United States for the District of Columbia against defendants United States Gypsum Company, National Gypsum Company, Certain-teed Products Corporation, Ebsary Gypsum Company, Inc., Newark Plaster Company, Oliver M. Knode, Melvin H. Baker and others. Said indictment is incorporated herein by reference and made a part hereof as though the same were fully set forth herein.

2. The defendants named in said indictment pleaded not guilty to the matters therein charged and, subsequent to the filing of the original answers herein of defendants Certain-teed Products Corporation and Henry J. Hartley, the defendants named in said indictment (except Warren Henley who died prior to the trial), were tried thereon before the District Court and a jury from October 13, 1941, to

November 20, 1941.

3. On November 20, 1941, after the Government had presented its evidence and rested, the District Court found on the merits that there was no evidence of a conspiracy and directed the jury to find a verdict of not guilty as to all defendants on each count of said indictment and, pursuant to said direction, the jury unanimously found each of the defendants not guilty on each count of said indictment. The judgment of the District Court entered upon said verdict is incorporated herein by reference hereto and made a part hereof as though fully set forth herein.

4. The alleged combination and conspiracy referred to in said indictment is the same alleged combination and conspiracy which is alleged in the Complaint, as amended

herein.

5. At all times mentioned in said indictment subsequent to May 13, 1939 and in the complaint, as amended herein, defendant herein Henry J. Hartley as President of Certainteed Products Corporation. All of the matters alleged in

the complaint herein with respect to Henry J. Hartley relate to his acts as President of Certain-teed Products Corporation. Said Henry J. Hartley therefore was and is in privity with said Certain-teed Products Corporation with respect to all matters mentioned in said indictment and in said complaint relating to said company.

6. The adjudication of the District Court and the judgment of acquittal rendered in favor of the defendants in said criminal cause as hereinabove set forth are res adjudicata and said judgment is a bar to the maintenance of this suit.

For a second affirmative defense:

7. Repeat each and all of the averments contained in paragraphs 1, 2, 3 and 5 of this supplemental answer with the same force and effect as if they were set forth here in full.

8. Upon the trial on said indictment the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act by establishing, fixing, maintaining and making uniform and non-competitive the resale prices, terms and conditions of sale (hereinafter referred to as "prices") of gypsum board of manufacturing distributors, were adjudged to be without merit.

9. Upon the trial on said indictment the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act (a) by requiring and coercing manufacturing distributors to maintain and adhere to the aforesaid prices in reselling gypsum board; (b) by agreeing to sell gypsum board to manufacturing distributors at a discount only upon the condition that such prices were maintained and adhered to; (c) by requiring manufacturing distributors, as a condition of sale, to agree, and by so agreeing, to resell gypsum board at such prices; (d) by notifying manufacturing distribu-tors of such prices; (e) by investigating and policing sales of gypsum board of manufacturing distributors at variance with such prices; (f) by holding meetings at which sales of gypsum board by manufacturing distributors at variance with such prices were discussed and at which it was agreed that such sales would be investigated and such manufacturing distributors would be induced to maintain and adhere to the said prices; (g) by notifying the manufacturing distributors of their alleged sales of gypsum board at prices at variance with such prices for the purpose and with the effect of warning the manufacturing distributors that they must adhere to such prices in order to continue

to purchase gypsum board; (h) by discontinuing to sell gypsum board to manufacturing distributors

who failed to maintain and adhere to such prices; and (i) by refusing to permit sales of gypsum board to companies selling gypsum products at wholesale because of the reputation of those companies for selling gypsum products below market prices, were adjudged to be without merit.

10. Upon the trial on said indictment, the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act by refraining from distributing gypsum board through jobbers, by refusing to sell gypsum board to jobbers at a discount and by eliminating jobbers from the distribution of gypsum board, were adjudged to be without merit.

11. Upon the trial on said indictment the license agreements referred to therein and the minimum prices at which licensees might sell patented gypsum board manufactured by them under such agreements, including the terms and conditions of sale, were adjudged to be valid and lawful.

12. Upon the trial on said indictment it was adjudged that the defendants therein named did not violate the Sherman Act, that the combination and conspiracy charged did not exist, that there was no evidence of an illegal combination or conspiracy and that the defendants' conduct was entirely lawful.

13. The matters referred to in paragraphs 8, 9, 10 and 11 of this supplemental answer are repeated in the Com-

plaint, as amended herein.

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14. By virtue of the adjudication of the District Court and the judgment of acquittal so rendered in favor of the defendants in said criminal cause as hereinabove set forth, the matters referred to in paragraphs 8, 9, 10, 11 and 12 of this supplemental answer are res adjudicata and plaintiff is estopped to relitigate them in this suit.

Wherefore, defendants Certain-teed Products Corporation and Henry J. Hartley demand judgment

dismissing the Complaint, with costs.

HAROLD G. MCGUIRE,

F. W. H. ADAMS,

Attorneys for Defendants, Certain-teed Products Corporation and Henry J. Hartley. 426 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Motion by defendants Ebsary Gypsum Company, Inc., and Frederick G. Ebsary for leave to file supplemental answer

Filed Oct. 19, 1942

Defendants Ebsary Gypsum Company, Inc., and Frederick G. Ebsary, by their attorneys named below, and upon the annexed affidavit of Alfred W. Varian sworn to October 16th, 1942, and upon all the proceedings herein, hereby respectfully move this Court for an order permitting them to serve a supplemental answer, a copy of which is annexed to the aforesaid affidavit of Alfred W. Varian.

Dated October 16, 1942.

Tumulty and Tumulty,
TUMULTY AND TUMULTY.

Attorneys for Defendants,
Ebsary Gypsum Company, Inc.,
and Frederick G. Ebsary,
1317 F Street NW.,
Washington, D. C.

I hereby certify that I have served the above Motion and Affidavit attached thereto and Statement of Points and Authorities on counsel for the plaintiff by mailing copies to Honorable Thurman Arnold, Assistant Attorney General, Department of Justice, Washington, D. C., on the 19th day of October, 1942.

Joseph P. Tumulty, Jr. Joseph P. Tumulty, Jr.

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Exhibit I

In the District Court of the United States

[Title omitted.]

'[File endorsement omitted.]

Defendants Ebsary Gypsum Company, Inc., and Frederick G. Ebsary, supplementing their answer filed herein on August 1, 1941, and further answering the Complaint as amended, allege:

For a first affirmative defense:

27. On June 28, 1940, an indictment was returned in the District Court of the United States for the District of Columbia against defendants United States Gypsum Company, National Gypsum Company, Certain-teed Products Corporation, Ebsary Gypsum Company, Inc., Newark Plaster Company, Oliver M. Knode, Melvin H. Baker and others.

28. The defendants named in said indictment pleaded not guilty to the matters therein charged and, subsequent to the filing of the original answer herein of defendants Ebsary Gypsum Company, Inc., and Frederick G. Ebsary, the defendants named in said indictment (except Warren Henley who died prior to the trial), were tried thereon before the District Court and a jury from October 13, 1941, to November 19, 1941.

29. On November 19, 1941, after the Government had presented its evidence and rested, the District Court found on the merits that there was no evidence of a conspiracy

and directed the jury to find a verdict of not guilty

as to all defendants on each count of said indictment and, pursuant to said direction, the jury unanimously found each of the defendants not guilty on each count of said indictment.

30. The alleged combination and conspiracy referred to in said indictment is the same alleged combination and conspiracy which is alleged in the Complaint, as amended

herein.

31. At all times mentioned in said indictment and in the complaint, as amended herein, defendant herein Frederick G. Ebsary, was President and a member of the Board of Directors of Ebsary Gypsum Company, Inc. All of the matters alleged in the complaint herein with respect to Frederick G. Ebsary relate to his acts as President of Ebsary Gypsum Company, Inc. Said Frederick G. Ebsary therefore was and is in privity with said Ebsary Gypsum Company, Inc., with respect to all matters mentioned in said indictment and in said complaint relating to said company.

32. The adjudication of the District Court and the judgment of acquittal rendered in favor of the defendants in said criminal cause as hereinabove set forth are res judicata and said judgment is a bar to the maintenance of

this suit.

For a second affirmative defense:

33. Repeat each and all of the averments contained in paragraphs 27 to 32 (both inclusive) of this supplemental answer with the same force and effect as if they were set forth here in full.

34. Upon the trial on said indictment the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act by

establishing, fixing, maintaining and making uniform and non-competitive the resale prices, terms and conditions of sale (hereinafter referred to as "prices") of gypsum board of manufacturing distributors,

were adjudged to be without merit.

35. Upon the trial on said indictment the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act (a) by requiring and coercing manufacturing distributors to maintain and adhere to the aforesaid prices in reselling gypsum board; (b) by agreeing to sell gypsum board to manufacturing distributors at a discount only upon the condition that such prices were maintained and adhered to; (c) by requiring manufacturing distributors, as a condition of sale, to agree, and by so agreeing, to resell gypsum board at such prices; (d) by notifying manufacturing distributors of such prices; (e) by investigating and policing sales of gypsum board of manufacturing distributors at variance with such prices; (f) by holding meetings at which sales of gypsum board by manufacturing distributors at variance with such prices were discussed and at which it was agreed that such sales would be investigated and such manufacturing distributors would be induced to maintain and adhere to the said prices; (g) by notifying the manufacturing distributors of their alleged sales of gypsum board at prices at variance with such prices for the purpose and with the effect of warning the . manufacturing distributors that they must adhere to such prices in order to continue to purchase gypsum board; (h) by discontinuing to sell gypsum board to manufacturing

distributors who failed to maintain and adhere to 430 such prices; and (i) by refusing to permit sales of gypsum board to companies selling gypsum products at wholesale because of the reputation of those com-

panies for selling gypsum products below market prices,

were adjudged to be without merit.

36. Upon the trial on said indictment, the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act by refraining from distributing gypsum board through jobbers, by refusing to sell gypsum board to jobbers at a discount and by-eliminating jobbers from the distribution of gypsum board, were adjudged to be without merit.

37. Upon the trial on said indictment the license agreements referred to therein and the minimum prices at which licensees might sell patented gypsum board manufactured by them under such agreements, including the terms and conditions of sale, were adjudged to be valid and lawful.

38. Upon the trial on said indictment it was adjudged that the defendants therein named did not violate the Sherman Act, that the combination and conspiracy charged did not exist, that there was no evidence of an illegal combination or conspiracy and that the defendants' conduct was entirely lawful.

39. The matters referred to in paragraphs 34, 35, 36 and 37 of this supplemental answer are repeated in the

Complaint, as amended herein.

40. By virtue of the adjudication of the District Court and the judgment of acquittal so rendered in favor of the defendants in said criminal cause as hereinabove

set forth, the matters referred to in paragraphs 34, 35, 36 and 37, of this supplemental answer are resjudicata and plaintiff is estopped to relitigate them in this suit.

Wherefore, defendants Ebsary Gypsum Company, Inc., and Frederick G. Ebsary demand judgment dismissing the Complaint, with costs.

Dated October 10, 1942.

TUMULTY AND TUMULTY,
Attorneys for Defendants,
Ebsary Gypsum Company, Inc.,
and Frederick G. Ebsary,
1317 F Street NW.,
Washington, D. C.

BLACK, VARIAN & SIMON,
ALFRED W. VARIAN,
HERBERT M. SIMON,
Of Counsel,

60 Wall Street, New York City.

432 In the District Court of the United States

[Title omitted.]
[File endorsement omitted.]

Motion for defendants, The Celotex Corporation and Bror G. Dahlberg for leave to file supplemental answer.

Filed Oct. 19, 1942

Defendants, The Celotex Corporation and Bror G. Dahlberg, by their attorneys named below, and upon the an-

nexed affidavit of Walter G. Moyle sworn to October 19, 1942, and upon all the proceedings herein, hereby respectfully move this Court for an order permitting them to serve a supplemental answer, a copy of which is annexed to the aforesaid affidavit of Walter G. Moyle.

Dated October 19, 1942.

Walter G. Moyle, Walter G. Moyle, Ralph P. Wanlass, RALPH P. WANLASS, ANDREW J. DALISTREAM, NORMAN WAITE,

Attorneys for defendants,

The Celotex Corporation,
and Bror G. Dahlberg,
1109 Earle Building,
Washington, D. C.

Receipt of a copy of the within motion of The Celotex Corporation and Bror G. Dahlberg for leave to file supplemental answer, and accompanying papers, is hereby acknowledged this 19th day of October, 1942.

EDWARD KNUFF,

Special Assistant to the Attorney General.

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### Exhibit I

In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Defendants, The Celotex Corporation and Bror G. Dahlberg, supplementing their answer filed herein on July 31, 1941, and further answering the complaint as amended, allege:

PART III

For a first affirmative defense:

1. On June 28, 1940, an indictment was returned in the District Court of the United States for the District of Columbia against defendants United States Gypsum Company, National Gypsum Company, Certain-teed Products Corporation, Ebsary Gypsum Company, Inc., Newark Plaster Company, and several officers and employees of some of these companies and of American Gypsum Company (acquired by The Celotex Corporation). A copy of said indictment is annexed hereto as Exhibit A and made a part hereof.

2. The defendants named in said indictment pleaded not guilty to the matters therein charged and, subsequent to the filing of the original answer herein of defendants, The Celotex Corporation and Bror G. Dahlberg, the defendants named in said indictment, were tried thereon before the District Court and a jury from October 13, 1941,

to November 19, 1941.

3. On November 19, 1941, after the Government had presented its evidence and rested, the District Court found on the merits that there was no evidence of a conspiracy and directed the jury to find a verdict of not guilty as to all defendants on each count of said indictment and, pursuant to said direction, the jury unanimously found each of the defendants not guilty on each count of said indictment. A copy of the judgment of the District Court entered upon said verdict is annexed hereto as Exhibit B and made a part hereof.

4. The alleged combination and conspiracy referred to in said indictment is the same alleged combination and conspiracy which is alleged in the Complaint, as amended

5. American Gypsum Company was named as co-conspirator with the defendants in the alleged combination and conspiracy referred to in said indictment. American Gypsum Company was a licensee of United States Gypsum Company, one of the defendants in said indictment, under the license agreement mentioned in paragraph 85 of the Complaint. All the defendant companies named in said indictment were licensees of United States Gypsum Company under similar license agreements. The Celotex Corporation acquired the assets of American Gypsum Company in April, 1939, and in connection with such acquisition, The Celotex Corporation became licensee of United States Gypsum Company under said license agreement of American Gypsum Company.

6. Bror G. Dahlberg is President of The Celotex Corporation and Chairman of the Board of Directors of Certain-teed Products Corporation, one of the defendants in said indictment, and the allegations in the Complaint with respect to him relate solely to his acts in such capacities.

7. The adjudication of the District Court and the judgment of acquittal rendered in favor of the defendants in said criminal cause as hereinabove set forth are

res judicata and said judgment is a bar to the maintenance of this suit.

For a second affirmative defense:

8. Repeat each and all of the averments contained in paragraphs 1, 2, 3, 5 and 6, Part III, of this supplemental answer with the same force and effect as if they were set forth here in full.

9. Upon the trial on said indictment, the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act by establishing, fixing, maintaining and making uniform and non-competitive the resale prices, terms and conditions of sale (hereinafter referred to as "prices") of gypsum board of manufacturing distributors, were adjudged to be without merit.

10. Upon the trial on said indictment, the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act (a) by requiring and coercing manufacturing distributors to maintain and adhere to the aforesaid prices in reselling gypsum board; (b) by agreeing to sell gypsum board to manufacturing distributors at a discount only upon the condition that such prices were maintained and adhered to; (c) by requiring manufacturing distributors, as a condition of sale, to agree, and by so agreeing, to resell gypsum board at such prices; (d) by notifying manufacturing distributors of such prices; (e) by investigating and policing sales of gypsum board of manufacturing distributors at variance with such prices; (f) by holding meetings at which sales of gypsum board by manufacturing distributors at variance with such prices were discussed and at which it was agreed that such sales would be investigated and such manufacturing distributors would be induced to maintain and adhere to the said prices; (g) by notifying the manu-

facturing distributors of their alleged sales of gypsum board at prices at variance with such prices for the purpose and with the effect of warning the manufacturing distributors that they must adhere to such prices in order to continue to purchase gypsum board; (h) by discontinuing to sell gypsum board to manufacturing distributors who failed to maintain and adhere to such prices; and (i) by refusing to permit sales of gypsum board to companies selling gypsum products at wholesale because of the reputation of those companies for selling gypsum products below market prices, were adjudged to be without merit.

11. Upon the trial on said indictment, the charges that the defendants therein named combined and conspired in

restraint of trade in violation of the Sherman Act by refraining from distributing gypsum board through jobbers, by refusing to sell gypsum board to jobbers at a discount and by eliminating jobbers from the distribution of gypsum board, were adjudged to be without merit.

12. Upon the trial on said indictment, the license agreements referred to therein and the minimum prices at which licensees might see patented gypsum board manufactured by them under such agreements, including the terms and conditions of sale, were adjudged to be valid and lawful.

13. Upon the trial on said indictment, it was adjudged that the defendants therein named did not violate the Sherman Act, that the combination and conspiracy charged did not exist, that there was no evidence of an illegal combination or conspiracy and that the defendants' conduct was entirely lawful.

14. The matters referred to in paragraphs 9, 10, 11 and 12, Part III, of this supplemental answer are repeated in

the Complaint, as amended herein.

15. By virtue of the adjudication of the District Court and the judgment of acquittal so rendered in favor of the defendants in said criminal cause as hereinabove set forth, the matters referred in paragraphs 9, 10, 11, 12 and 13, Part III, of this supplemental answer are res judicata and plaintiff is estopped to relitigate them in this suit.

Wherefore, defendants, The Celotex Corporation and Bror G. Dahlberg, demand judgment dismissing the Com-

plaint, with costs.

Walter G. Moyle,
Walter G. Moyle,
Ralph P. Wanlass,
RALPH P. WANLASS,
ANDREW J. DALLSTREAM,
NORMAN WAITE,

Attorneys for Defendants, The Celotex Corporation and Bror G. Dahlberg.

438 Exhibit A

[Omitted. Printed side page. 397 ante.]

458 Exhibit B

[Omitted. Printed side page. 419 ante.]

In the District Court of the United States
[Title omitted.]

Motion by defendants Newark Plaster Company and Frederick Tomkins for leave to file supplemental answer

## Filed October 19, 1942

Defendants Newark Plaster Company and Frederick Tomkins, by their attorneys named below, and upon the annexed affidavit of Benjamin P. DeWitt sworn to October 16, 1942, and upon all the proceedings herein, hereby respectfully move this Court for an order permitting them to serve a supplemental answer, a copy of which is annexed to the aforesaid affidavit of Benjamin P. DeWitt.

Dated October 16, 1942.

James O'Donnell, Jr., JAMES O'DONNELL, Benjamin P. DeWitt, BENJAMIN P. DEWITT,

Attorneys for Defendants Newark Plaster Company and Frederick Tomkins, Hibbs Building, Washington, D. C.

Oct. 19, 1942. Service accepted.

EDWARD KNUFF,

Special Assistant to Attorney General.

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Exhibit 1

In the District Court of the United States

[Title omitted.]
[File endorsement omitted.]

Defendants Newark Plaster Company and Frederick Tomkins, supplementing their answer filed herein on August 2, 1941, and further answering the Complaint as amended, allege:

For a first affirmative defense:

46. On June 28, 1940, an indictment was returned in the District Court of the United States for the District of Columbia against defendants United States Gypsum Company, National Gypsum Company, Certain-teed Products Corporation, Ebsary Gypsum Company, Inc., Newark Plas461

ter Company, Oliver M. Knode, Melvin H. Baker and others. A copy of said indictment is annexed hereto as Exhibit A

and made a part hereof.

47. The defendants named in said indictment pleaded not guilty to the matters therein charged, and subsequent to the filing of the original answer herein of defendants

Newark Plaster Company and Frederick Tomkins, the defendants named in said indictment (except

Warren Henley who died prior to the trial), were tried thereon before the District Court and a jury from

October 13, 1941, to November 20, 1941.

48. On November 20, 1941, after the Government had presented its evidence and rested, the District Court found on the merits that there was no evidence of a conspiracy and directed the jury to find a verdict of not guilty as to all defendants on each count of said indictment and, pursuant to said direction, the jury unanimously found each of the defendants not guilty on each count of said indictment. A copy of the judgment of the District Court entered upon said verdict is annexed hereto as Exhibit B and made a part hereof.

49. The alleged combination and conspiracy referred to in said indictment is the same alleged combination and conspiracy which is alleged in the Complaint, as amended

herein.

50. At all times mentioned in said indictment and in the complaint, as amended herein, defendant herein Frederick Tomkins, was President of Newark Plaster Company. All of the matters alleged in the complaint herein with respect to Frederick Tomkins relate to his acts as President of Newark Plaster Company. Said Frederick Tomkins, therefore, was and is in privity with said Newark Plaster Company with respect to all matters mentioned in said indictment and in said complaint relating to said company.

51. The adjudication of the District Court and the judgment of acquittal rendered in favor of the defendants in

said criminal cause as hereinabove set forth are res judicata and said judgment is a bar to the maintenance of this suit.

For a second affirmative defense:

52. Repeat each and all of the averments contained in paragraphs 46, 47, 48 and 50 of this supplemental answer with the same force and effect as if they were set forth here in full.

53: Upon the trial on said indictment the charges that the defendants therein named combined and conspired in

restraint of trade in violation of the Sherman Act by establishing, fixing, maintaining and making uniform and non-competitive the resale prices, terms and conditions of sale (hereinafter referred to as "prices") of gypsum board of manufacturing distributors, were adjudged to be without merit.

54. Upon the trial on said indictment the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act (a) by requiring and coercing manufacturing distributors to maintain and adhere to the aforesaid prices in reselling gypsum board; (b) by agreeing to sell gypsum board to manufacturing distributors at a discount only upon the condition that such prices were maintained and adhered to; (c) by requiring manufacturing distributors, as a condition of sale, to agree, and by so agreeing, to resell gypsum board at such prices; (d) by notifying manufacturing distribu-tors of such prices; (e) by investigating and policing sales of gypsum board of manufacturing distributors at variance with such prices; (f) by holding meetings at which sales of gypsum board by manufacturing distribu-

tors at variance with such prices were discussed and

at which it was agreed that such sales would be investigated and such manufacturing distributors would be induced to maintain and adhere to the said prices; (g) by notifying the manufacturing distributors of their al-leged sales of gypsum board at prices at variance with such prices for the purpose and with the effect of warning the manufacturing distributors that they must adhere to such prices in order to continue to purchase gypsum board; (h) by discontinuing to sell gypsum board to manufacturing distributors who failed to maintain and adhere to such prices; and (i) by refusing to permit sales of gypsum board to companies selling gypsum products at wholesale because of the reputation of those companies for selling gypsum products below market prices, were adjudged to be without merit.

55. Upon the trial on said indictment, the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act by refraining from distributing gypsum board through jobbers, by refusing to sell gypsum board to jobbers at a discount and by eliminating jobbers from the distribution of gypsum board, were adjudged to be without merit.

56. Upon the trial on said indictment the license agreements referred to therein and the minimum prices at which licensees might sell patented gypsum board manufactured by them under such agreements, including the terms and

conditions of sale, were adjudged to be valid and lawful.

57. Upon the trial on said indictment it was adjudged that the defendants therein named did not violate the Sherman Act, that the combination and conspiracy charged did not exist, that there was no evidence 464

of an illegal combination or conspiracy and that the defendants' conduct was entirely lawful.

58. The matters referred to in paragraphs 53, 54, 55, 56 and 57 of this supplemental answer are res judicata and plaintiff is estopped to relitigate them in this suit.

Wherefore, defendants Newark Plaster Company and Frederick Tomkins demand judgment dismissing the Complaint, with costs.

JAMES O'DONNELL. BENJAMIN P. DEWITT,

> Attorneys for Defendants Newark Plaster Comand Frederick Tomkins.

465 Exhibit A [Omitted. Printed side page. 397 ante.]

Exhibit B 487 Omitted. Printed side page. 419 ante.]

In the District Court of the United States 488 [Title omitted.]

[File endorsement omitted.]

Motion by defendant Samuel M. Gloyd, doing business under the trade name of Texas Cement Plaster Company, for leave to file supplemental answer

Filed October 20, 1942

Defendant Samuel M. Gloyd, doing business under the trade name of Texas Cement Plaster Company, by his attorneys named below, and upon the annexed affidavit of David I. Johnston sworn to October 17, 1942, and upon all the proceedings herein, hereby respectfully moves this Court for an order permitting him to serve a supplemental answer, a copy of which is annexed to the aforesaid affidavit of David I. Johnston.

Dated October 17, 1942.

David I. Johnston, DAVID I. JOHNSTON, Commerce Exchange Building, Oklahoma City, Oklahoma. Geo. E. H. Goodner, GEO. H. GOODNER, Munsey Building, Washington, D. C.

This will acknowledge receipt of the foregoing motion with attached Statement of Points and Authorities, Affidavit of David I. Johnston and Supplemental Answer.

This 20th day of October, 1942.

Roscoe T. Steffen, Roscoe T. Steffen, Counsel for Plaintiff.

In the District Court of the United States
[Title omitted.]

[File endorsement omitted.]

The defendant Samuel M. Gloyd, doing business under the trade name of Texas Cement Plaster Company, supplementing his answer filed herein on July 31, 1941, and further answering the Complaint as amended, alleges:

For a first affirmative defense:

124. On June 28, 1940, an indictment was returned in the District Court of the United States for the District of Columbia against defendants United States Gypsum Company, National Gypsum Company, Certain-teed Products Corporation, Ebsary Gypsum Company, Inc., Newark Plaster Company, Oliver M. Knode, Melvin H. Baker and others. A copy of said indictment is annexed hereto as Exhibit A and made a part hereof by reference to said Exhibit attached to the supplemental answer of United States Gypsum Company, et al.

125. The defendants named in said indictment pleaded not guilty to the matters therein charged and, subsequent to the filing of the original answer herein of defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, the defendants named in said indictment

(except Warren Henley who died prior to the trial), were tried thereon before the District Court and a jury from October 13, 1941, to November 19, 1941.

126. On November 19, 1941, after the Government had presented its evidence and rested, the District Court found on the merits that there was no evidence of a conspiracy and directed the jury to find a verdict of not guilty as to all defendants on each count of said indictment and, pursuant to said direction, the jury unanimously found each of the defendants not guilty on each count of said indictment. A copy of the judgment of the District Court entered upon said verdict is annexed hereto as Exhibit B and made a part hereof by reference to said Exhibit attached to the supplemental answer of United States Gypsum Company, et al.

127. The alleged combination and conspiracy referred to in said indictment is the same alleged combination and

conspiracy which is alleged in the Complaint, as amended herein, and though this defendant was not indicted, the United States is the plaintiff in both actions and the charges of the combination and conspiracy are between and among this defendant and the other defendants who were indicted and who were acquitted.

128. The adjudication of the District Court and the judgment of acquittal rendered in favor of the defendants in said criminal action as hereinabove set forth are resjudicate and said judgment is a bar to the maintenance of

this action.

For a second affirmative defense:

129. Repeats each and all of the averments contained in paragraphs 124, 125 and 126 of this supplemental answer which are hereby adopted with the same force and effect as if they were set forth here in full.

130. Upon the trial on said indictment the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act by establishing, fixing, maintaining and making uniform and non-competitive the resale prices, terms and conditions of sale (hereinafter referred to as "prices") of gypsum board of manufacturing distributors, were adjudged to be without merit.

131. Upon the trial on said indictment the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act (a) by requiring and coercing manufacturing distributors to maintain and adhere to the aforesaid prices in reselling gypsum board; (b) by agreeing to sell gypsum board to manufacturing distributors at a discount only upon the condition that such prices were maintained and adhered to: (c) by requiring manufacturing distributors, as a condition of sale, to agree, and by so agreeing, to resell gypsum board at such prices; (d) by notifying manufacturing distributors of such prices; (e) by investigating and policing sales. of gypsum board of manufacturing distributors at variance with such prices; (f) by holding meetings at which sales of gypsum board by manufacturing distributors at variance with such prices were discussed and at which it was agreed that such sales would be investigated and such manufacturing distributors would be induced to maintain and adhere to the said prices; (g) by notifying the manufacturing

distributors of their alleged sales of gypsum board 492 at prices at variance with such prices for the purpose and with the effect of warning the manufacturing distributors that they must adhere to such prices in order to continue to purchase gypsum board; (h) by discontinuing to sell gypsum board to manufacturing distributors who failed to maintain and adhere to such prices; and (i) by refusing to permit sales of gypsum board to companies selling gypsum products at wholesale because of the reputation of those companies for selling gypsum products below market prices, were adjudged to be without merit.

132. Upon the trial on said in lictment, the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act by refraining from distributing gypsum board through jobbers, by refusing to sell gypsum board to jobbers at a discount and by eliminating jobbers from the distribution of gypsum board, were adjudged to be without merit.

133. Upon the trial on said indictment the license agreements referred to therein and the minimum prices at which licensees might sell patented gypsum board manufactured by them under such agreements, including the terms and conditions of sale, were adjudged to be valid and lawful.

134. Upon the trial on said indictment it was adjudged that the defendants therein named did not violate the Sherman Act, that the combination and conspiracy charged did not exist, that there was no evidence of an illegal combination or conspiracy and that the defendants' conduct was entirely lawful.

135. The matters referred to in paragraphs 130, 131, 132 and 133 of this supplemental answer are repeated in

the Complaint, as amended herein.

136. By virtue of the adjudication of the District Court and the judgment of acquittal so rendered in favor of the defendants in said criminal action as hereinabove set forth, the matters referred to in paragraphs 130, 131, 132, 133 and 134 of this supplemental answer are res judicata and plaintiff is estopped to relitigate them in this suit.

Wherefore, defendant Samuel M. Gloyd, doing business under the trade name of Texas Cement Plaster Company, demands judgment dismissing the Complaint, with costs.

> David I. Johnston David I. Johnston,

Commerce Exchange Building, Oklahoma City, Oklahoma.

Geo. E. H. Goodner, GEO. H. GOODNER, Munsey Building, Washington, D. C. 494 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Motion by defendants National Gypsum Company and Melvin H. Baker for leave to file supplemental answer

Filed Oct. 20, 1942

Defendants National Gypsum Company, and Melvin H. Baker, by their attorneys named below, and upon the annexed affidavit of Elmer E. Finck, sworn to October 19, 1942, and upon all the proceedings herein, hereby respectfully move this Court for an order permitting them to serve a supplemental answer, a copy of which is annexed to the aforesaid affidavit of Elmer E. Finck.

Dated October 19, 1942.

Nicholas J. Chase,
Nicholas J. Chase,
Elmer E. Finck,
ELMER E. FINCK,
Attorneys for Defendants,
NATIONAL GYPSUM COMPANY
and
MELVIN H. BAKER,

1000 Bowen Building, Washington, D. C.

Service had by mailing copy to Roscoe T. Steffens, Esq., Dept. of Justice, this 20th day of October, 1942. Each of the co-defendants was mailed a copy Oct. 19, 1942. Original and 6 copies filed with Deputy Clerk Coplin.

NICHOLAS J. CHASE,

495

Exhibit I

In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Defendants National Gypsum Company and Melvin H. Baker, supplementing their answer filed herein on August 1, 1947, and further answering the Complaint as amended, allege:

For a first affirmative defense:

86. On June 28, 1940, an indictment was returned in the District Court of the United States for the District of

Columbia against Defendants United States Gypsum Company, National Gypsum Company, Certain-teed Products Corporation, Ebsary Gypsum Company, Inc., Newark Plaster Company, Oliver M. Knode, Melvin H. Baker and others. A copy of said indictment is annexed to the Supplemental Answer of the defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode as Exhibit A and by reference made a part hereof.

87. The defendants named in said indictment pleaded not guilty to the matters therein charged and, subsequent to the filing of the original answer herein of defendants National Gypsum Company, and Melvin H. Baker, the defendants named in said indictment (except Warren Henley who died prior to the trial), were tried thereon before the District Court and a jury from October 13, 1941, to

November 20, 1941.

88. On November 20, 1941, after the Government had presented its evidence and rested, the District Court found on the merits that there was no evidence of a conspiracy and directed the jury to find a verdict of not guilty as to all defendants on each count of said indictment and, pursuant to said direction, the jury unanimously found each of the defendants not guilty on each count of said indictment. A copy of the judgment of the District Court entered upon said verdict is annexed to the Supplemental Answer of the Defendants, United States Gypsum Company, Sewell L. Avery and Oliver M. Knode as Exhibit B and by reference made a part hereof.

496 89. The alleged combination and conspiracy referred to in said indictment is the same alleged combination and conspiracy which is alleged in the Complaint,

as amended herein.

90. The adjudication of the District Court and the judgment of acquittal rendered in favor of the defendants in said criminal cause as hereinabove set forth are res judicata and said judgment is a bar to the maintenance of this suit.

For a second affirmative defense:

91. Repeat each and all of the averments contained in paragraphs 86, 87 and 88 of this supplemental answer with the same force and effect as if they were set forth here in full.

92. Upon the trial on said indictment the charges that the defendants therein named, combined and conspired in restraint of trade in violation of the Sherman Act by establishing, fixing, maintaining and making uniform and non-competitive the resale prices, terms and conditions of sale (hereinafter referred to as "prices") of gypsum board

of manufacturing distributors, were adjudged to be with-

· 93. Upon the trial on said indictment the charges that the defendants therein named, combined and conspired in restraint of trade in violation of the Sherman Act (a) by requiring and coercing manufacturing distributors to maintain and adhere to the aforesaid prices in reselling gypsum board: (b) by agreeing to sell gypsum board to manufacturing distributors at a discount only upon the condition that such prices were maintained and adhered to: (c) by requiring manufacturing distributors, as a condition of sale, to agree, and by so agreeing, to resell gypsum board at such prices; (d) by notifying manufacturing distributors of such prices; (e) by investigating and policing sales of gypsum board of manufacturing distributors at variance with such prices; (f) by holding meetings at which sales of gypsum board by manufacturing distributors at variance with such prices were discussed and at which it was agreed that such sales would be investigated and such manufacturing distributors would be induced to maintain and adhere to the said prices; (g) by notifying the manufacturing distributors of their alleged sales of gypsum board at prices at variance with such prices for the purpose and with the effect of warning the manufacturing distributors that they must adhere to such prices in order to continue to purchase gypsum board; (h) by discontinuing to sell gypsum board to manufacturing distributors who failed to maintain and adhere to such prices; and (i) by refusing to permit sales of gyp-

wholesale because of the reputation of those companies for selling gypsum products below market prices,

were adjudged to be without merit.

94. Upon the trial on said indictment, the charges that the defendants therein named combined and conspired in restraint of trade in violation of the Sherman Act by refraining from distributing gypsum board through jobbers, by refusing to sell gypsum board to jobbers at a discount and by eliminating jobbers from the distribution of gypsum board, were adjudged to be without merit.

95. Upon the trial on said indictment the license agreements referred to therein and the minimum prices at which licensees might sell patented gypsum board manufactured by them under such agreements, including the terms and conditions of sale, were adjudged to be valid and lawful.

96. Upon the trial on said indictment it was adjudged that the defendants therein named did not violate the Sherman Act, that the combination and conspiracy charged did

not exist, that there was no evidence of an illegal combination or conspiracy and that the defendants' conduct was entirely lawful.

97. The matters referred to in paragraphs 92, 93, 94 and 95 of this supplemental answer are repeated in the

Complaint, as amended herein.

98. By virtue of the adjudication of the District Court and the judgment of acquittal so rendered in favor of the defendants in said criminal cause as hereinabove set forth, the matters referred to in paragraphs 92, 93, 94, 95 and 96 of this supplemental answer are res judicata and plaintiff is estopped to relitigate them in this suit.

Wherefore, defendants National Gypsum Company, and Melvin H. Baker demand judgment dismissing the Com-

plaint, with costs.

Nicholas G. Chase,
Nicholas G. Chase,
Elmer E. Finck,
ELMER E. FINCK,
Attorneys for Defendants
National Gypsum Company
and Melvin H. Baker,
1000 Bowen Building,
Washington, D. C.

In the District Court of the United States
[Title omitted.]
[File endorsement omitted.]

Motion by plaintiff, United States of America, for leave to amend the prayer of the complaint.

Filed Oct. 31, 1942

Plaintiff, United States of America, by its attorney named below, hereby respectfully moves this Court for an order permitting it to amend the prayer of the complaint in accordance with the amendment annexed hereto.

Dated October 30, 1942.

Roscoe T. Steffen,
Roscoe T. Steffen,
Edward Knuff,
EDWARD KNUFF,
Special Assistants to the

Attorney General,
Attorneys for Plaintiff.

Thurman Arnold, THURMAN ARNOLD,

Assistant Attorney General.

I hereby certify that I have served the above motion, and Statement of Points and Authorities on counsel for each of the defendants by mailing copies to them at their offices on the 30th day of October, 1942.

Roscoe T. Steffen, Roscoe T. Steffen, Attorney for Plaintiff.

In the District Court of the United States [Title omitted.]

[File endorsement omitted.]

These ordered substituted on March 12, 1943, for prayers of orig. complaint.

# Amendment to prayer in complaint

Plaintiff, United States of America, hereby amends the prayer contained in the complaint heretofore filed on August 15, 1940, in the following respects: viz., strike paragraphs Nos. 5 to 9, inclusive, and substitute therefor the fol-

lowing:

5. That the defendant companies, and each of them, be required to cancel the provisions of the aforesaid license agreements which (a) authorize the defendant U. S. G. to determine and fix the prices of gypsum board manufactured by the licensees, (b) provide for payment of royalties by the licensees on patents not used by the licensees or on gypsum board not manufactured or bundled by patents owned by U. S. G., (c) prohibit the sale of gypsum board by the licensees to manufacturers, jobbers, and other distributors without the consent of the defendant U. S. G., and (d) acknowledge the validity of any existing patents or of any patents which may be issued in the future upon pending applications.

6. That the defendant companies, and each of them, and their directors, officers, employees, and agents, and all persons or corporations acting on behalf of said companies, be perpetually enjoined from entering into any license agreement relating to any gypsum products and containing provisions which (a) authorize the licensor to determine and fix the prices of its licensees, (b) provide for payment of royalties by the licensees on patents not used by the licensees or on gypsum products not manufactured by the use of patents, (c) control in any way the methods of distribution of the licensees, or (d) acknowledge the validity of

any existing patents or of any patents which may be issued in the future upon pending applications.

500 7. That the defendant companies, and each of them, and their directors, officers, employees, and agents, and all persons or corporations acting on behalf of said companies be enjoined from

(a) bringing any action for infringement of any patent or patents now owned or controlled by any of the defendants or hereafter issued on pending applications now owned or

controlled by any of the defendants,

(b) attempting by suit or otherwise to collect royalties or license fees or profits for the use of patents now owned or controlled by any of the defendants or hereafter issued on pending applications now owned or controlled by any of the defendants

relating to gypsum products or to any process or machine used in connection with gypsum products, until it is made to appear to the Court that all improper practices have been abandoned and the consequences of all misuses of pat-

ents have been dissipated.

8. That the defendant companies, and each of them, and their directors, officers, employees, and agents, and all persons or corporations acting on behalf of said companies, be enjoined from entering into any license agreement relating to gypsum products without first obtaining the consent of the Court.

9. That plaintiff have such other further and general

relief as may be proper. ...

10. That, pursuant to Section 5 of the Sherman Antitrust Act, writs of subpoena issued to such of the defendants as are not otherwise subject to service within the District of Columbia, commanding them and each of them to appear herein and to answer under oath each allegation contained in this complaint, and to abide by and perform such acts, orders, and decrees as the Court may make in the premises.

Roscoe T. Steffen,
Roscoe T. Steffen,
Edward Knuff,
EDWARD KNUFF,
Special Assistants to the
Attorney General,
Attorneys for Plaintiff.

Thurman Arnold, THURMAN ARNOLD, Assistant Attorney General. 501 In the District Court of the United States [Title omitted.]

[File endorsement omitted.]

Order granting leave to file supplemental answers Filed Nov. 6, 1942

On consideration of the motions of defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode; of the Certain-teed Products Corporation and Henry J. Hartley; and of the Ebsary Gypsum Company, Inc., and Frederick G. Ebsary, filed herein on October 15, 1942; of the motions of the defendants Celotex Corporation and Bror G. Dahlberg; and of the Newark Plaster Company and Frederick Tomkins, filed herein on October 19, 1942; of the motions of defendants Samuel M. Gloyd doing business under the name of Texas Cement Plaster Company; and of the National Gypsum Company and Melvin H. Baker, filed herein on October 20, 1942, for leave to file supplemental answers, accompanied by proposed supplemental answers and exhibits thereto, it is by the Court this 6th November, 1942,

Ordered that the motions of the said defendants for leave to file supplemental answers be and the same is hereby

granted: and it is

Further ordered that the proposed supplemental answers and attached exhibits accompanying the motions are ordered filed as supplemental answers this date.

By the court:

HAROLD M. STEPHENS,

Justice Presiding.

502 In the District Court of the United States [Title omitted.]

[File endorsement omitted.]

Motion by plaintiff, United States of America, for leave to amend the complaint

<sup>4</sup> Filed Feb. 24, 1943

Plaintiff, United States of America, by its attorneys named below, hereby respectfully moves this Court for an order permitting it to amend the complaint in accordance with the amendment annexed hereto.

Dated February 22, 1943.

Roscoe T. Steffen, ROSCOE T. STEFFEN, Edward Knuff, EDWARD KNUFF,

Special Assistant to the Attorney General, Attorneys for Plaintiff. I hereby certify that I have served the above motion, and Statement of Points and Authorities on counsel for each of the defendants by mailing copies to them at their offices on the 22nd day of February, 1943.

Edward Knuff, EDWARD KNUFF, Attorney for Plaintiff.

503 In the District Court of the United States
[Title omitted.]
[File endorsement omitted.]

#### Amendment to complaint

Plaintiff, United States of America, hereby amends the complaint heretofore filed on August 15, 1940, in the following respects; viz., insert after paragraph No. 46 a new

paragraph numbered 46a which reads as follows:

46a. Many of the patents mentioned and described in said license agreements by which the said combination has been, and is being carried out in part, are process or machine patents. The article and product claims of Roos patents No. 2,017,022, No. 2,079,338, No. 2,080,009, No. 1,914,345 and No. 1,938,354 mentioned and described in said license agreements and said patents, are each invalid and void for each of the following reasons: (a) there is no real invention or novelty in the claims of said patents; (b) the claims of said patents disclose no patentable invention in view of the prior art at the time the respective applications were filed; (c) the alleged inventions described in the claims. of said patents were shown and described in printed publications in the United States more than two years prior to the filing of the respective applications; (d) the alleged inventions described in the claims of said patents are inoperative and devoid of novelty or utility; (e) the alleged inventions described in the claims of said patents were abandoned by the inventor and he was guilty of laches before the respective applications were filed; (f) the alleged inventions described in the claims of said patents were not reduced to practice until after other inventors had invented and reduced the same to practice and applied for patents thereon; (g) the said alleged inventions are

described in ambiguous and not in properly clear, concise and exact terms and; (h) the defendants have been informed of the invalidity of the claim of the said patents and have unreasonably failed to file in the United States Patent Office any disclaimer of such claims.

The said patents mentioned and described in the said license agreements, even assuming they are valid, are not basic article or product patents and do not singly or all together cover completely the business of mining and selling gypsum, or cover completely gypsum board, which is one of the forms in which unpatented gypsum is sold by the defendants, but at most constitute minor additions to the established and unpatented art of making gypsum board and afford no legal justification for the said combination.

Roscoe T. Steffen, Roscoe T. Steffen, Edward Knuff, EDWARD KNUFF,

Special Assistants to the Attorney General, Attorneys for Plaintiff.

505 In the District Court of the United States
[Title omitted.]
[File endorsement omitted.]

Order amending prayers of complaint Filed March 12, 1943

Upon consideration of the motion of the plaintiff for leave to amend prayers of the complaint by striking paragraphs 5 to 9 inclusive and substituting therefor the proposed prayers filed on October 31, 1942, and there being no objection of record or argued, it is by the Court this 12th day of March, 1943,

Ordered, That the proposed prayers 5 to 9 inclusive filed October 51, 1942, be and they hereby are substituted for the prayers 5 to 9 inclusive in the original complaint.

HAROLD M. STEPHENS, Justice Presiding

506 In the District Court of the United States
[Title omitted.]
[File endorsement omitted.]

Order to amend complaint Filed March 12, 1943

Upon consideration of the motion of the plaintiff for leave to amend the complaint and the same having been argued, it is by the Court this 12th day of March, 1943, Ordered, That the motion of the plaintiff to amend the

Ordered. That the motion of the plaintiff to amend the complaint by adding a paragraph numbered 46a be and the same is hereby granted and the proposed amendment filed

February 24, 1943, is ordered filed as paragraph 46a of

the complaint.

This order is without prejudice to the right of the defendants to attack the legal sufficiency of said paragraph 46a, and subject also to the right of the defendants to move in writing for a bill of particulars as to the matters set out in said amendment, and subject also to the right of the defendants to adequate time to answer or otherwise plead following the filing of such particulars, and subject also to the right of the defendants to reasonable opportunity to prepare, prior to the commencement of trial, to defend the allegations of said amendment.

> HAROLD M. STEPHENS. Justice Presiding.

In the District Court of the United States

[Title omitted.]

File endorsement omitted. 1.

Interrogatories on behalf of the United States of America. to be answered under oath by defendant United States Gypsum Company pursuant to Rule 33 of the Federal Rules of Civil Procedure

Filed Jan. 23, 1942

506(5) 40. Describe the process or processes used by you from November 1929 to October 1935 to increase adhesion between the core and liners of gypsum board manufactured by you.

41. When did you first produce a gypsum board in which

any starch, flour, carbohydrate or gelatin was incorporated?
42. Describe fully all processes or methods used by you from and including the year 1920 to August 15, 1940 in the production of gypsum board in which any starch, flour, carbohydrate or gelatin was used or incorporated, and as to each and every such process or method, state the period of time during which the same was used by you, and specify with particularity all products used in said board, including the brand name or description of all starch, flour, carbohydrate or gelatin so used; the method or methods used by you in the cooking of said starch, flour, carbohydrate or gelatin if said cooking was done by you; the method of handling, treating, or introducing into said gypsum board or other ingredients of which said board was composed of any starch, carbohydrate, flour, or gelatin, whether cooked ' or uncooked, indicating how and at what state in the production of said gypsum board said starch, flour, carbo-hydrate, or gelatin was incorporated, and the physical form or appearance of said starch, flour, carbohydrate, or

gelatin at the time of its introduction or incorporation into the other ingredients or substances of which said board was composed.

506(6)

Grant W. Kelleher, GRANT W. KELLEHER,

Special Assistant to the Attorney General.

THURMAN ARNOLD,

Assistant Attorney General.

GEORGE HADDOCK,

Special Assistant to the Attorney General.

ALFRED KARSTED,

Special Attorney.

Date:

506(7) In the District Court of the United States

[Title omitted.]

[File endorsement omitted.].

Interrogatories on behalf of the United States of America to be answered under oath by defendant National Gypsum Company pursuant to Rule 33 of the Federal Rules of Civil Procedure

Filed Jan. 23, 1942

506(11) 40. Describe the process or processes used by you from November 1929 to October 1935 to increase adhesion between the core and liners of gypsum board manufactured by you.

42. When did you first produce gypsum board in which any starch, flour, carbohydrate or gelatin was incorporated?

43. Describe fully all processes or methods used by you from and including the year 1925 to August 15, 1940 in the production of gypsum board in which any starch, flour, carbohydrate or gelatin was used or incorporated, and as to each and every such process or method, state the period of time during which the same was used by you, and specify with particularity all products used in said board, including the brand name or description of all starch, flour, carbohydrate or gelatin so used; the method or methods used by you in the cooking of said starch, flour, carbohydrate or gelatin if said cooking was done by you; the method of handling, treating, or introducing into said gypsum board or other ingredients of which said board was composed of any starch, carbohydrate, flour or gelatin, whether cooked or uncooked, indicating how and at what state in the production of said gypsum board said starch, flour, carbohy-

drate, or gelatin was incorporated, and the physical form or appearance of said starch, flour, carbohydrate, or gelatin at the time of its introduction or incorporation into the other ingredients or substances of which said board was composed.

506(12)

Grant W. Kelleher, GRANT W. KELLEHER,

Special Assistant to the Attorney General.

THURMAN ARNOLD,

Assistant Attorney General.

GEORGE HADDOCK,

Special Assistant to the Attorney General.

ALFRED KARSTED.

Special Attorney.

Date:

506(13) In the District Court of the United States
[Title omitted.]

[File endorsement omitted.]

Interrogatories on behalf of the United States of Amercia to be answered under oath by defendant Certain-teed Products Corporation pursuant to Rule 33 of the Federal Rules of Civil Procedure

### Filed Jan. 23, 1942.

506(17) 43. Describe the process or processes used by you from November 1929 to October 1935 to increase adhesion between the core and liners of gypsum. board manufactured by you.

45. When did you first produce a gypsum board in which any starch, flour, carbohydrate or gelatin was incorporated?

46. Describe fully all processes or methods used by you from and including the year 1925 to August 15, 1940 in the production of gypsum board in which any starch, flour, carbohydrate or gelatin was used or incorporated, and as to each and every such process or method, state the period of time during which the same was used by you, and specify with particularity all products used in said board, including the brand name or description of all starch, flour, carbohydrate or gelatin so used; the method or methods used by you in the cooking of said starch, flour, carbohydrate or gelatin if said cooking was done by you; the method of handling, treating, or introducing into said gypsum board or other ingredients of which said board was composed of any starch, carbohydrate, flour or gelatin, whether cooked or uncooked, indicating how and at what state in the pro-

duction of said gypsum board said starch, flour, carbohydrate, or gelatin was incorporated, and the physical form or appearance of said starch, flour, carbohydrate, or gelatin at the time of its introduction or incorporation into the other ingredients or substances of which said board was composed.

506(18)

Grant W. Kelleher, GRANT W. KELLEHER,

Special Assistant to the Attorney General.

THURMAN ARNOLD,

Assistant Attorney General.

GEORGE HADDOCK,

Special Assistant to the Attorney General.

ALFRED KARSTED,

Special Attorney.

Date:

506(19) In the District Court of the United States
[Title omitted.]

[File endorsement omitted.]

Interrogatories on behalf of the United States of America to be answered under oath by defendant, The Celotex Corporation, pursuant to Rule 33 of the Federal Rules of Civil Procedure

Filed Jan. 23, 1942

506(21). 31. When did you first produce a gypsum board in which any starch, flour, carbohydrate or gelatin was incorporated?

by you from and including the year 1938 to August 15, 1940 in the production of gypsum board in which any starch, flour, carbohydrate or gelatin was used or incorporated, and as to each and every such process or method, state the period of time during which the same was used by you, and specify with particularity all products used in said board, including the brand name or description of all starch, flour, carbohydrate or gelatin so used; the method or methods used by you in the cooking of said starch, flour, carbohydrate or gelatin if said cooking was done by you; the method of handling, treating, or introducing into said gypsum board or other ingredients of which said board was composed of any starch, carbohydrate, flour or gelatin, whether cooked or uncooked, indicating how and at what state in the production of said gypsum board said

starch, flour, carbohydrate, or gelatin was incorporated, and the physical form or appearance of said starch, flour, carbohydrate, or gelatin at the time of its introduction or incorporation into the other ingredients or substances of which said board was composed.

506(23)

Grant W. Kelleher. GRANT W. KELLEHER,

Special Assistant to the Attorney General.

THURMAN ARNOLD.

Assistant Attorney General.

GEORGE HADDOCK,

Special Assistant to the Attorney General.

ALFRED KARSTED.

Special Attorney.

506:24) In the District Court of the United States

[Title omitted.]

File endorsement omitted.]

Interrogatories on behalf of the United States of America to be answered under oath by defendant, Ebsary Gypsum Company, Inc., pursuant to Rule 33 of the Federal Rules of Civil Procedure

Filed Jan. 23, 1942

506(28) 40. Describe the process or processes used by you from November 1929 to October 1935 to increase adhesion between the core and liners of gypsumboard manufactured by you.

42. When did you first produce a gypsum board in which any starch, flour, carbohydrate or gelatin was incorpo-

43. Describe fully all processes or methods used by you from and including the year 1928 to August 15, 1940 in the production of gypsum board in which any starch, flour, carbohydrate or gelatin was used or incorporated, and as to each and every such process or method, state the period of time during which the same was used by you, and specify with particularity all products used in said board, including the brand name or description of all starch, flour, carbohydrate or gelatin so used; the method or methods used by you in the cooking of said starch, flour, carbohydrate or gelatin if said cooking was done by you; the method of handling, treating, or introducing into said gypsum board or other ingredients of which said board was composed of any starch, carbohydrate, flour or gelatin, whether cooked or uncooked, indicating how and at what state in the production of said gypsum board said starch, flour, carbohydrate, or gelatin was incorporated, and the physical form or appearance of said starch, flour, carbohydrate, or gelatin at the time of its introduction or incorporation into the other ingredients or substances of which said board was composed.

506 (29).

Grant W. Kelleher, GRANT W. KELLEHER,

Special Assistant to the Attorney General.

THURMAN ARNOLD,

Assistant Attorney General.

GEORGE HADDOCK,

Special Assistant to the Attorney General.

ALFRED KARSTED, Special Attorney.

506(30) In the District Court of the United States
[Title omitted.]

[File endorsement omitted.]

Interrogatories on behalf of the United States of America to be answered under oath by defendant, Newark Plaster Company, pursuant to Rule 33 of the Federal Rules of Civil Procedure

# Filed Jan. 23, 1942

506(34) 42. When did you or Kelley first produce a gypsum board in which any starch, flour, carbohy-

drate or gelatin was incorporated?

43. Describe fully all processes or methods used by you and all processes or methods used by Kelley from and including the year 1937 to August 15, 1940 in the production of gypsum board in which any starch, flour, carbohydrate. or gelatin was used or incorporated, and as to each and every such process or method, state the period of time during which the same was used by you or Kelley, and specify with particularity all products used in said board, including the brand name or description of all starch, flour, carbohydrate or gelatin so used; the method or methods used by you or Kelley in the cooking of said starch, flour, carbohydrate or gelatin if said cooking was done by you or Kelley; the method of handling, treating, or introducing into said gypsum board or other ingredients of which said board was composed of any starch, carbohydrate, flour or gelatin, whether cooked or uncooked, indicating how and at what state in the production of said gypsum board said starch, flour, carbohydrate, or gelatin was incorporated, and the physical form or appearance of said starch, flour, carbohydrate, or gelatin at the time of its introduction or incorporation into the other ingredients or substance of which said board was composed.

506(35)

Grant W. Kelleher, GRANT W. KELLEHER,

Special Assistant to the Attorney General.

THURMAN ARNOLD,
Assistant Attorney General.

GEORGE HADDOCK,

Special Assistant to the Attorney General.

ALFRED KARSTED,

Special Attorney.

506(36) In the District Court of the United States
[Title omitted.]
[File endorsement omitted.]

Interrogatories on behalf of the United States of America to be answered under oath by defendant, Texas Cement Plaster Company, pursuant to Rule 33 of the Federal Rules of Civil Procedure

Filed Jan. 23, 1942

506(39). 36. Describe the process or processes used by you from November 1929 to October 1935 to increase adhesion between the core and liners of gypsum board manufactured by you.

38. When did you first produce a gypsum board in which any starch, flour, carbohydrate, or gelatin was incorpo-

rated?

39. Describe fully all processes or methods used by you from and including the year 1925 to August 15, 1940 in the production of gypsum board in which any starch, flour, carbohydrate or gelatin was used or incorporated, and as to each and every such process or method, state the period of time during which the same was used by you, and specify with particularity all products used in said board, including the brand name or description of all starch, flour, carbohydrate or gelatin so used; the method or methods used by you in the cooking of said starch, flour, carbohydrate or gelatin if said cooking was done by you; the method of handling, treating, or introducing into said gyp-

handling, treating, or introducing into said gyp-506(40) sum board or other ingredients of which said board was composed of any starch, carbohydrate, flour or gelatin, whether cooked or uncooked, indicating how and at what state in the production of said gypsum board said starch, flour, carbohydrate, or gelatin was incorporated, and the physical form or appearance of said starch, flour, carbohydrate, or gelatin at the time of its introduction or incorporation into the other ingredients or substances of which said board was composed.

Grant W. Kelleher, GRANT W. KELLEHER,

Special Assistant to the Attorney General.

THURMAN ARNOLD,

Assistant Attorney General.

GEORGE HADDOCK, Special Assistant to the Attorney General.

ALFRED KARSTED; Special Attorney.

506(41) District Court of the United States
[Title omitted.]

[File endorsement omitted.]

Order upon motions for orders sustaining objections to interrogatories

Filed April 5, 1943

Whereas the United States of America, plaintiff, hereinafter referred to as the Government, served upon the defendants in the above entitled case and filed with the clerk of the court, pursuant to Rule 33 of the Federal Rules of Civil Procedure, interrogatories as follows:

United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, all hereinafter referred to as United States Gypsum Company, interrogatories 1 to 51 inclusive.

National Gypsum Company and Melvin H. Baker, both hereinafter referred to as National Gypsum Company, interrogatories 1 to 53 inclusive.

Certain-teed Products Corporation and Henry J. Hartley, both hereinafter referred to as Certain-teed Products

Corporation, interrogatories 1 to 56 inclusive.

The Celotex Corporation and Bror G. Dahlberg, both hereinafter referred to as The Celotex Corporation, interrogatories 1 to 42 inclusive.

Ebsary Gypsum Company, Inc., and Frederick G. Ebsary, both hereinafter referred to as Ebsary Gypsum Company, interrogatories 1 to 53 inclusive.

Newark Plaster Company and Frederick Tomkins, both hereinafter referred to as Newark Plaster Company, interrogatories 1 to 59 inclusive. Samuel M. Gloyd, doing business under the trade name of Texas Cement Plaster Company, hereinafter referred to as Texas Cement Plaster Company, interrogatories 1 to 47 inclusive; and

Whereas the defendants served upon the Government and filed with the clerk of the court motions for orders sus-

taining objections to said interrogatories; and

Whereas upon the fifteenth day of October, 1942, the court heard argument by counsel both for the Government and for the defendants upon said motions; and 506(42) Whereas thereafter the Government withdrew

certain of said interrogatories or portions thereof

as follows:

United States Gypsum Company: interrogatories 1 to 14 inclusive; 17, 18, 19; the first sentence of 20; the first sentence of 21; the words "or No. 1, closed edge or semi-closed edge gypsum board" in line 4 of 26; 30, 31, 37, 38, 49, 50, 51.

National Gypsum Company: interrogatories 1 to 14 inclusive; 17, 18, 19, 20; the first sentence of 21; all of 22 except the last four lines; the words "or No. 1, closed edge or semi-closed edge gypsum board" in line 4 of 26; all of 27 following the words "closed edge gypsum board" in line

2 thereof; 32, 33, 35, 36, 38, 39, 44, 51, 52, 53.

Certain-teed Products Corporation: interrogatories 1 to 14 inclusive; 17, 18, 19, 20, 21; the first sentence of 22; that portion of 23 ending with the words "to August 15, 1940"; the words "or No. 1, closed edged or semi-closed edge gypsum board" in line 4 of 27; all of 28 following the words "closed edge gypsum board" in line 2 thereof; 29, 30, 31, 32, 37, 38, 40, 41, 47, 54, 55, 56.

The Celotex Corporation: interrogatories 1 to 14 inclusive; 17, 18, 19, 20; the second sentence of 21; that portion of 22 ending with the words "to August 15, 1940"; 24, 25,

27, 28, 33, 40, 41, 42.

Ebsary Gypsum Company: interrogatories 1 to 14 inclusive; 17, 18, 19; the first sentence of 20; all of 21 except the last four lines; all of 26 following the words "closed edge gypsum board" in line 2; the words "or No. 1, closed edge or semi-closed edge gypsum board" in line 4 of 25; 31, 32, 33, 35, 36, 38, 39, 44, 51, 52, 53.

Newark Plaster Company: interrogatories 1 to 14 inclusive; 17, 18, 19, 20, 21, 22; first sentence of 23; first sentence of 24; that portion of 25 ending with the words "to August 15, 1940"; that portion of 26 ending with the words "to January 1, 1939"; 33, 34, 35, 36, 38, 39, 44, 54,

55, 56, 57, 58, 59.

Texas Cement Plaster Company: interrogatories 1 to 12 inclusive; 15, 16, 17; that portion of 18 ending with the words "to August 15, 1940"; the words "or No. 1, closed edge or semi-closed edge gypsum board; in line 4 of 22; that portion of 23 following the words "closed edge gypsum board" in line 2; 27, 28, 31, 32, 34, 35, 40, 45, 46, 47; and Whereas upon the twelfth day of March, 1943, further

argument upon said interrogatories was heard; and

Whereas counsel for the respective parties have filed briefs in support of said interrogatories and the objections

thereto: and

Whereas the court has given consideration to all of the interrogatories or portions thereof which have not been withdrawn and to the objections thereto and to the arguments and briefs of the respective parties and is now fully advised in the premises;

Now, therefore, the court orders and rules in respect of those interrogatories or portions thereof which have not

been withdrawn as follows, to wit:

United States Gypsum Company: interrogatory 506 (44)

National Gypsum Company: interrogatory 40.

Certain-teed Products Corporation: interrogatory 43.

Ebsary Gypsum Company: interrogatory 40.

Texas Cement Plaster Company: interrogatory 36.

The objections of the defendants, respectively, upon the ground that the interrogatories seek irrelevant material are overruled.

The objections of the defendants, respectively, upon the ground that the same interrogatories in asking for trade secrets seek privileged material are overruled for the rea-

son that trade secrets are not the subject of an 506(45) absolute but only of a qualified privilege. But

that portion of the defendants' answers which describes trade secrets may be furnished to the clerk of the court, subject to examination by counsel for the Government only and subject to the understanding that the information disclosed by any one defendant shall not be furnished to any other defendant or person except by permission of the court at the trial of this case.

The objections of the defendants, respectively, upon the ground that the same interrogatories are unduly burdensome are treated as withdrawn, the defendants having agreed at the hearing on March 12, 1943, notwithstanding

such objections, to answer said interrogatories.

United States Gypsum Company: interrogatory 41. National Gypsum Company: interrogatory 42.

Certain-teed Products Corporation: interrogatory 45.

The Celotex Corporation: interrogatory 31.

Ebsary Gypsum Company: interrogatory 42.

Newark Plaster Company: interrogatory 42.

Texas Cement Plaster Company: interrogatory 38.

The objections of the defendants, respectively, are overruled, except that the Newark Plaster Company is not to be required in answering interrogatory 42 to investigate records outside of its own possession concerning the Kelley Plasterboard Company, Inc.

United States Gypsum Company: interrogatory 42. National Gypsum Company: interrogatory 43.

Certain-teed Products Corporation: interrogatory 46.

The Celotex Corporation: interrogatory 32. Ebsary Gypsum Company: interrogatory 43. Newark Plaster Company: interrogatory 43.

Texas Cement Plaster Company: interrogatory 39.

The objections of the defendants, respectively, upon the ground that the interrogatories seek irrelevant material

are overruled.

The objections of the defendants, respectively, upon the ground that the same interrogatories in asking for trade secrets seek privileged material are overruled for the reason that trade secrets are not the subject of an absolute but only of a qualified privilege. But that portion of the defendants' answers which describes trade secrets may be furnished to the clerk of the court, subject to examination by counsel for the Government only and subject to the understanding that the information disclosed by any one defendant shall not be furnished to any other defendant or person except by permission of the court at the trial of this case.

The objections of the defendants, respectively, upon the ground that the same interrogatories are unduly burdensome are treated as withdrawn, the defendants having agreed at the hearing on March 12, 1943, notwith-

agreed at the hearing on March 12, 1943, notwith-506(46) standing such objections, to answer said interrogatories to the best of their ability, except that the Newark Plaster Company is not to be required in answering interrogatory 43 to investigate records outside of its own possession concerning the Kelley Plasterboard Company, Inc.

506(48) This order is made subject to the ruling of the court on the motions for summary judgment, as follows: If said motions are sustained, no interrogatories are to be answered. If said motions are overruled, thirty

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days from the time of the overruling of said motions is allowed to each of the defendants in which to answer the interrogatories required to be answered.

Harold M. Stephens, HAROLD M. STEPHENS, Justice Presiding.

APR. 5, 1943.

In the District Court of the United States
[Title omitted.]

[File endorsement omitted.]

Defendants' motion to strike or, in the alternative, for partial judgment

Filed September 28, 1943

Defendents, by their respective attorneys named below, and upon the pleadings herein and annexed affidavit of Bruce Bromley, sworn to September 27, 1943, respectfully move this Court for an order, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, striking paragraph 46(a) of the complaint, as amended, upon the ground that the allegations thereof are immaterial and impertinent to the issue herein or, in the alternative, for partial judgment, pursuant to Rules 12(b) and 56(b) dismissing that part of plaintiff's claim as is contained in said paragraph 46(a) upon the ground that, as a matter of law, plaintiff may not attack the validity of patents in these proceedings in the manner attempted in said paragraph, and for such other and further relief as to the Court shall seem just and proper. Dated September 27, 1943.

Hugh Lynch, Jr., Bruce Bromley, Esq., Lewis Ulman, Esq., Attorneys for defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, 616-621 Transportation Building, Washington, D. C.; Nicholas J. Chase, Esq., Elmer E. Finck, Esq., Attorneys for defendants National Gypsum, Company and Melvin H. Baker, 1000 Bowen Building, Washington, D. C.; Harold F. McGuire, Esq., F. W. H. Adams, Esq., Attorneys for defendants Certain-teed Products Corporation and Henry J. Hartley, 1026 17th Street, N.W., Washington, D. C.; Norman Waite, Esq., Walter G. Moyle, Esq., Attorneys for defendants The Celotex Corporation and Bror G. Dahlberg, Earle Building, Washington, D. C.: Alfred W. Varian, Esq., Joseph P. Tumulty, Esq., Attorneys for defendants Ebsary Gypsum Company, Inc., and

Frederick G. Ebsary, 1317 F Street, N.W., Washington, D. C.; Benjamin P. DeWitt, Esq., James O'Donnell, Jr., Esq., Attorneys for defendants Newark Plaster Company and Frederick Tomkins, 305 Hibbs Building, Washington, D. C.; David I. Johnston, Esq., Geo. E. H. Goodner, Esq., Attorneys for defendant Samuel M. Gloyd, Munsey Building, Washington, D. C.

Served September 28, 1943. ROSCOE T. STEFFEN

509 In the District Court of the United States
[Title omitted.]

[File endorsement omitted.]

Affidavit of Bruce Bromley Filed Sept. 28, 1943

Bruce Bromley, being duly sworn, deposes and says:

I am an attorney and counselor at law and am counselfor defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode in the above-entitled action.

In order to avoid any question as to whether the legal sufficiency of paragraph 46(a) of the complaint, as amended, can be considered on the bare allegations contained therein, the following facts are submitted in connection with the alternative relief sought under Rules 12(b) and 56(b). The five patents referred to in paragraph 46(a) were issued by the United States Patent Office as follows: No. 2,017,022 on October 8, 1935, No. 2,079,338 on May 4, 1937, No. 2,080,009 on May 11, 1937, No. 1,914,345 on June 13, 1933, and No. 1,938,354 on December 5, 1933. None of said patents has ever been held to be invalid by any court.

Defendants further state that, on this motion, they do not admit the allegations of paragraph 46(a), their contention being that, as a matter of law, the validity of patents duly issued by the United States Patent Office may not be questioned as attempted in said paragraph.

Bruce Bromley
BRUCE BROMLEY

Sworn to before me this 27th day of September 1943.

Saul Schneiderman, Saul Schneiderman,

Notary Public, Kings County.

Kings Co. Clk's No. 1149, Reg. No. 491S5, N. Y. Co. Clk's No. 1, Reg. No. 592S5.

Commission Expires March 39, 1945.

510(1) In the District Court of the United States
[Title omitted.]

[File endorsement omitted.]

Affidavit of Edward Knuff Filed Oct. 5, 1943

CITY OF WASHINGTON,

District of Columbia, :::

Edward Knuff, being duly sworn, deposes and says:

I am a Special Assistant to the Attorney General and am of counsel for the plaintiff in the above-entitled cause and

am familiar with all proceedings therein.

It is true that the five patents mentioned in paragraph 46(a) of the complaint were issued on the dates set out in the Bromley affidavit of September 27, 1943, and that "none of said patents has ever been held invalid by any court." It is also true that the claims of said patents, alleged in said paragraph 46(a) to be invalid and void, have never been held valid by any court.

It is further believed that the claims of the five patents alleged in paragraph 46(a) to be invalid and void are the only patents upon which the defendants have based their admitted price-fixing combination in restraint of trade.

Edward Knuff, EDWARD KNUFF,

Special Assistant to the Attorney General, Attorney for Plaintiff.

Subscribed and sworn to before me this 4th day of October 1943.

[SEAL]

DOROTHY J. HEALE, Notary Public.

My commission expires October 1, 1944.

510(2) In the District Court of the United States
[Title omitted.]

[File endorsement omitted.]

Oct. 16, 1943. Service of copy accepted. Edward Knuff, Sp. Asst. to Atty. Gen., Atty. for Plf.

Reply affidavit of defendants on motion to strike or, in the alternative, for partial judgment

Filed Oct. 16, 1943

STATE OF NEW YORK,

County of New York, 88:

George S. Collins, being duly sworn, deposes and says: Certain statements are made in the affidavit of Edward Knuff, sworn to October 4, 1943, which, it is submitted, are immaterial to the present motion. However, in order to maintain the accuracy of the record, defendants respect-

fully submit this affidavit in reply.

The Knuff affidavit states that the claims of the patents referred to in paragraph 46(a) of the complaint have never been held valid by any court. In connection with Patent No. 2,017,022 interference proceedings, within the Patent Office and in the Supreme Court of the District of Columbia and the Court of Appeals of the District of Columbia, covering a period of over ten years, were had as the result of which said patent finally issued on October 8, 1935. Patent No. 2,079,338 was finally issued on May 4, 1937, after a suit in the Supreme Court of the District of Columbia in which the final decree provided that the claims of the patent defined inventions that were new, useful and patentable and that the applicant was the true, original and sole inventor thereof, and that United States Gypsum Company, as assignee of the applicant, was entitled to receive letters patent thereon. Similarly, after a suit in the Supreme Court of the District of Columbia, that Court entered a final decree holding that claims 10 to 18, both inclusive, of Patent No. 2,080,009 defined inventions that were new, useful and patentable and that the applicant was the true, original and sole inventor thereof, and that United States Gypsum Company, as assignee of the applicant, was entitled to receive letters patent thereon. Claims 1, 2 and 3 of this patent were allowed by the Board of Appeals of the Patent Office and claims 4 to 9, both inclusive, were allowed as the result of interference proceedings within the Patent

The Knuff affidavit further states that it is believed that the five patents referred to in paragraph 46(a) "are the only patents upon which the defendants have based their admitted price fixing combination in restraint of trade." Reference to the license agreements involved in this case will demonstrate the inaccuracy of this statement in so far as it refers to the patents mentioned in paragraph 46(a). In so far as the balance of the statement is concerned, de-

fendants have made no such admission.

Office.

GEORGE S. COLLINS,

Sworn to before me this 15th day of October 1943.

Saul Schneiderman, SAUL SCHNEIDERMAN,

Notary Public, Kings County.

Kings Co. Clk's No. 1149, Reg. No. 491S5, N. Y. Co. Clk's No. 1, Reg. No. 592S5.

Commission Expires March 30, 1945.

510(4)

Department of Commerce
United States Patent Office

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the records of this office of the Letters Patent of Carlisle K. Roos, assignor to United States Gypsum Company, Number 2,017,022. Granted October 8, 1935, for Improvement in Cementitious Materials.

Filed Nov. 18, 1943. Charles E. Stewart, Clerk.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington, this eleventh day of November, in the year of our Lord one thousand nine hundred and forty-three, and of the Independence of the United States of America the one hundred and sixty-eighth.

[SEAL]

CONWAY P. COE, Commissioner of Patents.

· Attest:

JOHN HANS, Chief of Division.

510(5)

The United States of America

To all to whom these presents shall come:

Whereas, Carlisle K. Roos, of Fort Dodge, Iowa, assignor to United States Gypsum Company, of Chicago, Illinois, a corporation of Illinois, presented to the Commissioner of Patents a petition praying for the grant of Letters Patent for an alleged new and useful improvement in cementitious materials, a description of which invention is contained in the specification of which a copy is hereunto annexed and made a part hereof, and complied with the various requirements of Law in such cases made and provided, and

Whereas upon due examination made the said Claimant is adjudged to be justly entitled to a patent under the Law.

Now therefore these Letters Patent are to grant unto the said United States Gypsum Company, its successors or assigns for the term of seventeen years from the date of this grant the exclusive right to make, use and vend the said invention throughout the United States and the Territories thereof.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington this eighth day of October, in the year of our Lord one thousand nine hundred and thirty-five, and

of the Independence of the United States of America the one hundred and sixtieth.

SEAL

CONWAY P. COE, Commissioner of Patents.

Attest:

H. S. MILLER, Law Examiner.

511 Supreme Court of the United States

Revocation of designation of judge of the United States Court of Customs and Patent Appeals for service in the District Court of the United States for the District of Columbia

Filed Nov. 13, 1943

The Honorable Oscar E. Bland having requested that because of his ill-health he be relieved of his assignment to perform the duties of District Judge and hold a District Court in the District of Columbia, made by me on September 15, 1942; and it appearing in my judgment that the public interests require that his designation and assignment for judicial service in the District Court in the District of Columbia be revoked; Now, therefore, pursuant to the authority vested in me by Title 28, Section 20, of the Code of Laws of the United States of America, I do hereby revoke, effective November 15, 1943, said designation and assignment of Honorable Oscar E. Bland, Judge of the United States Court of Customs and Patent Appeals, to perform the duties of District Judge and hold a District Court in the District of Columbia.

HARLAN F. STONE, Chief Justice of the United States.

Dated, Washington, D. C., November 12, 1943.

512 Supreme Court of the United States

Designation of a judge of the United States Court of Customs and Patent Appeals for service in the District Court of the United States for the District of Columbia

Filed Nov. 13, 1943

The Chief Justice of the District Court of the United States for the District of Columbia having requested the designation and assignment of a judge of the United States Court of Customs and Patent Appeals for service in said District Court because of the accumulation and urgency of business in said Court, and it appearing in my judgment that the public interest requires such designation and assignment for judicial service in the District Court of the

United States for the District of Columbia during the period beginning November 15, 1943, and ending December 31, 1943; NOW THEREFORE, pursuant to the authority vested in me by Title 28, Section 22, of the Code of Laws of the United States of America, I do hereby designate and assign, effective November 15, 1943, the Honorable Joseph R. Jackson, Judge of the United States Court of Customs and Patent Appeals, to perform the duties of a District Judge and hold a District Court in the District of Columbia, during the period aforesaid, and for such further time as may be required to complete unfinished business.

HARLAN F. STONE,

Chief Justice of the United States.

Dated, Washington, D. C., November 12, 1943:

513 In the United States Court of Appeals For the District of Columbia

[Title omitted.]

[File endorsement omitted.]

Amendment to designation of judges

Filed Nov. 13, 1943

The Chief Justice of the United States, because of the illhealth of Honorable Oscar E. Bland, having revoked, effective November 15, 1943, his designation of the Honorable Oscar E. Bland under date of September 15, 1942, to perform the duties of a District Judge in the District Court of the United States for the District of Columbia, it has become necessary to amend my designation of judges to hear and determine the above-entitled case dated September 15, 1942, so as to provide for the replacement of said Honorable Oscar E. Bland by another district judge; NOW THEREFORE, pursuant to the authority vested in me by Section 28 of Title 15 of the Code of Laws of the United States, I hereby amend said designation of September 15, 1942, by designating, effective November 15, 1943, the Honorable Joseph R. Jackson, heretofore designated by the Chief Justice of the United States to perform the duties of a District Judge in the District Court of the United States. for the District of Columbia, in the place and stead of the said Oscar E. Bland, to hear and determine the aboveentitled case.

Dated November 13, 1943.

Chief Justice of the United States Court
of Appeals for the District of Columbia.

In the District Court of the United States 514. For the District of Columbia

File endorsement omitted.

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

UNITED STATES GYPSUM COMPANY ET AL., DEFENDANTS

Opinion on motion to strike paragraph 46 (a) of the Government's complaint, or, in the alternative, for partial judgment dismissing that part of the Government's claim contained in that paragraph

Decided November 15, 1943

Messrs. Roscoe T. Steffen and Edward Knuff, Special

Assistants to the Attorney General, for plaintiff.

Messrs. Bruce Bromley and Hugh Lynch, Jr., for the defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode; Messrs. Nicholas J. Chase and Elmer E. Finck, for the defendants National Gypsum Company and Melvin H. Baker; Messrs, Harold F. McGuire, F. W. H. Adams, Leonard B. Ettelson and Stephen Allie, for the defendants Certain-teed Products Corporation and Henry J. Hartley; Messrs. Walter G. Moyle, Ernest M. Oliver, Andrew J. Dallstream and Norman Waite, for the defendants The Celotex Corporation and Bror G. Dahlberg; Messrs. Joseph P. Tumulty, Joseph P. Tumulty, Jr., Alfred W. Varian and Herbert M. Simon, for the defendants Ebsary Gypsum Company, Inc., and Frederick G. Ebsary; Messrs. James O'Donnell, Jr., and Benjamin P. DeWitt, for the defendants Newark Plaster Company and Frederick Tom-kins; and Messrs. George E. H. Goodner, Scott P. Crampton, D. I. Johnston, Roy C. Lytle, James R. Keaton, and Frank Wells, for the defendant Samuel M. Gloyd, doing business under the trade name of Texas Cement Plaster Company.

Before STEPHENS, Associate Justice, United States Court of Appeals for the District of Columbia (Presiding), and BLAND and GARRETT, Judges, United States Court of Customs and Patent Appeals, designated as Justices of the District Court of the United States for the District of Columbia.1

515 STEPHENS, J.: This action, commenced by the United States, hereafter for convenience referred to as the Government, on August 15, 1940, is for equitable

<sup>1</sup> Holding a three-judge statutory court pursuant to the provisions of 15 U.S.C. 4 28, as amended by the Act of April 6, 1942, Public No. 515, 77th Congress, 2d Sess.

relief under Section 4 of the Sherman Act. The complaint charges that the defendants have been engaged in a combination and conspiracy in restraint of trade and commerce in gypsum products in violation of Sections 1, 2, and 3 of the Act.<sup>2</sup> It is alleged that the combination and conspiracy have been carried out in connection with certain patent license agreements based on patents owned by the United States Gypsum Company covering the manufacture of gypsum board. Upon these license agreements the defendants themselves rely as properly establishing prices and terms of sale of gypsum board within the doctrine of United States v. General Electric Company, 272 U.S. 476 (1926). On March 12, 4943, the Government was permitted by an order of this court to amend its complaint by adding a paragraph 46 (a) attacking the validity of the patents upon which the license agreements are based. The para-

graph is in the following terms:

46a. Many of the patents mentioned and described in said license agreements by which the said combination has been, and is being carried out in part, are process or machine patents. The article and product claims of Roos patents No. 2,017,022, No. 2,079,338, No. 2,080,009, No. 1,914,345 and No. 1,938,354 mentioned and described in said license agreements and said patents, are each invalid and void for each of the following reasons: (a) there is no real invention or novelty in the claims of said patents; (b) the claims of said patents disclose no patentable invention in view of the prior art at the time the respective applications were filed; (c) the alleged inventions described in the claims of said patents were shown and described in printed publications in the United States more than two years prior to the filing of the respective applications; (d) the alleged inventions described in the claims of said patents are inoperative and devoid of novelty or utility; (e) the alleged inventions described in the claims of said patents were abandoned by the inventor and he was guilty of laches before the respective applications were filed; (f) the alleged inventions described in the claims of said patents were not reduced to practice until after other inventors had invented and reduced the same to practice and applied for patents thereon; (g) the said alleged inventions are described in ambiguous and not in properly clear, concise

and exact terms and; (h) the defendants have been informed of the invalidity of the claims of the said patents and have unreasonably failed to file in the

<sup>2 26</sup> Stat. 209 (1890), as amended by 36 Stat. (167 (1611), 50 Stat. 693 (1937); 15 U.S.C. 49 1, 2, 3, 4 (1940).

United States Patent Office any disclaimer of such claims. The said patents mentioned and described in the said license agreements, even assuming they are valid, are not basic article or product patents and do not singly or all together cover completely the business of mining and selling gypsum, or cover completely gypsum board, which is one of the forms in which unpatented gypsum is sold by the defendants, but at most constitute minor additions to the established and unpatented art of making gypsum board and afford no legal

justification for the said combination.

The order allowing this paragraph to be added to the complaint was made expressly without prejudice to the right of the defendants to question the legal sufficiency of the allegations, and it was urged by counsel for all parties that a ruling upon this question should be made prior to the commencement of trial in order that counsel might be advised as to the necessity of preparation for attack upon, or defense of, the validity of the patents. The defendants accordingly filed this motion to strike or for partial judgment. The motion is one, pursuant to Rule 12 (f) of the Federal Rules of Civil Procedure, to strike paragraph 46 (a) upon the ground that the allegations thereof are immaterial and impertinent to the issues in the case; and the motion is made, in the alternative, under Rules 12 (b) and 56 (b) for partial judgment dismissing that part of the Government's claim contained in paragraph 46 (a) upon the gound that as a matter of law the Government may not attack the validity of the patents in this proceeding in the manner attempted. It is conceded that the five patents mentioned in the paragraph were issued by the Commissioner of Patents, sometimes hereafter referred to as the Commissioner, and that none of them has heretofore been held invalid by any court. The dates of application and issuance of the Roos patents are: No. 2,017,022, application filed August 20, 1924, patent issued October 8, 1935; No. 2,079,338, application filed January 19, 1925, patent issued May 4, 1937; No. 2,080,009, application filed October 16, 1926, patent issued May 11, 1937; No. 1,914,345, application filed July 7, 1932, patent issued June 13, 1933; No. 1,938,354, application filed March 15, 1933, pat-

No. 1,938,354, application filed March 15, 1933, patent issued December 5, 1933. The patents are each in the usual form, set forth in the margin. It is not

<sup>3</sup> Original application January 19, 1925, which was a division of the August 20, 1924, application.

<sup>4</sup> No. 2017022

The United States of America

To All To Whom These Presents Shall Come:
Whereas Carlisle K. Ross, of Fort Dodge, Iowa, assignor to United States Gypsum
Company, of Chicago, Illinois, a corporation of Illinois, presented to the Commissioner of

charged by the Government in its complaint that the issuance of the patents was obtained by fraud or any other wrongful act. What the Government asserts, in essence, is that, for the reasons set out in paragraph 46 (a), the Commissioner erred in issuing the patents. It is to be noted further that the attack upon the validity of the patents, in this aspect of the case, is not upon the ground that they are invalid because being used in violation of the Sherman Act; it is the converse, that the Sherman Act is being violated, through the license agreements, because the patents upon which the agreements are based are invalid. It is also to be borne in mind that, while this is not an independent cancelation proceeding, but an antitrust suit in which the Government contends that the patents are invalid, nevertheles the Government is seeking a judicial determination that the Patent Office erred in issuing the patents and that they are for that reason invalid. This was conceded in the oral argument. And the Government's prayer asks cancelation of the provisions of the license agreements, asks that the defendants be perpetually enjoined from entering into any license agreements containing similar provisions, and that the defendants be enjoined from bringing any action for infringement of any of the patents now owned or controlled by them, and from attempting to collect royalties or license fees or profits for the use of the patents now owned or controlled by them, until it is made to appear to the court that all improper practices have been abandoned and the consequences of all misuses of the patents have been dissipated, and that the defendants be enjoined from entering into any license agreements relating to gypsum products without first obtaining the consent of the court. Accordingly, so far as the effect upon the defendants and the patents is concerned, the distinction be-

Patents a petition praying for the grant of Letters Patent for an alleged new and useful improvement in cementitious materials, a description of which invention is contained in the specification of which a copy is hereunto annexed, and made a part hereof, and complied with the various requirements of law in such cases made and provided, and Whereas upon due examination made the said Claimant is adjudged to be justly entitled to a patent under the Law.

Now therefore these letters naterit are to examinate the said Value of the s

to a patent under the Law.

Now therefore these letters patent age to grant unto the said United States Gypsum Company, its successors or assigns for the term of SEVENTEEN years from the date of this grant the exclusive right to make, use and vend the said invention throughout the United States and the Territories thereof.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington this eighth day of October, in the year of our Lord one thousand nine hundred and thirty-five, and of the Independence of the United States of America the one hundred and sixtieth.

CONWAY P. COE,

[Seal]

CONWAY P. COE. Commissioner of Patchts.

Attest: H. S. MILLER, Law Examiner. .

Roos patent No. 2,079,338 is in base verbs, as are the other patents except that No. 2,080,009 is for an improvement in plaster wallboards and methods of making them; No. 1,914,345 for an improvement in wall construction; and No. 1,938,354 for an improvement in fire-resistant wall and ceiling structures.

tween this suit and an independent cancelation proceeding is not substantial.

The essential question raised by the motion is whether or not the Government, in an antitrust proceeding prosecuted by its Department of Justice, can seek a determination that the Commissioner erred in issuing patents relied on by the defendants as a foundation for license agreements, and that the patents are therefore invalid, it not being

charged that the action of the Commissioner was 519 obtained by fraud. The question involves inquiry into the authority of the Government to question its own action, and into the power of the court to review an administrative determination.

I

No statute answers the question. The Act of June 25, 1910, 36 Stat. 851, 35 U.S.C. § 68. (1940), providing that whenever an invention covered by a United States patent is used or manufactured by the United States itself without license of the owner, or lawful right, the owner's remedy shall be by a suit against the United States in the Court of Claims for compensation and that in such suit the United States may avail itself of any defense that might be pleaded by a defendant in an action for infringement, contemplates, when read in connection with Rev. Stat. § 4920 (1875), 35 U.S.C. § 69 (1940), a defense based upon the ground that the patent was erroneously granted—thus allowing the Government to question the action taken by its own official, the Commissioner of Patents. Cf. Richmond Screw Anchor Co. v. United States, 275 U.S. 331 (1928). But this statute is obviously not pertinent here. The Government is not in this case defending against accusation of infringement.

II

There is no controlling judicial decision directly in point. In United States v. Porcelain Appliance Corp., unreported (N.D. Ohio E.D. Sept. 9, 1926), an antitrust proceeding to dissolve an allegedly illegal combination, the court denied a motion to strike from the Government's bill allegations pertaining to the validity and scope of patents. The court reasoned that, while the suit was not one to cancel patents and it was probably beyond the scope of all possible issues to decree patents or patent claims to be void, it was conceivable that patents invalid or limited in

<sup>5</sup> The term "invalid" as applied to patents issued in error is a misnomer. Strictly such a term should be applied only to patents obtained by fraud, or wholly beyond the jurisdiction of the Commissioner. But the term is constantly used in the authorities in application to patents issued in error, and for convenience and verbal consistency, will be so used herein.

nature, in view of the prior art, might be wrongfully used in building up an illegal combination, and that whether the case was of such nature as to permit or require inquiry into questions of validity or scope of patents could not be determined adversely to the plaintiff on a motion to strike out. The court did not, however, discuss the essence of the matter, i.e., the question whether the Government can raise an issue as to the validity of its own action in granting patents, and the case is not, therefore, of persuasive value; and, as it is a District Court decision, and is from another

jurisdiction, it is not controlling.

Other cases principally relied upon by the Government are the following, which are here enumerated, for convenience, in the order in which they will be discussed: United States v. Standard Oil Co., 33 F. (2d) 617 (N.D. Ill. 1929), reversed on other grounds 283 U.S. 163 (1931); Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc., unreported (D. Mass. Oct. 4, 1943); Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173 (1942); United States v. Socony-Vacuum Oil Co., 310 U.S, 150 (1940); United States v. Univis Lens Co., 316 U.S, 241 (1942); Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940); United States v. Masonite Corp., 316 U.S. 265 (1942); United States v. Bell Telephone Company, 167 U.S. 224 (1897). In United States v. Standard Oil Co., an antitrust injunction suit alleging restraint of trade by virtue of agreements dealing with the right to use patented processes and apparatus, a master certified to the District Court the question of the admissibility of evidence offered by the Government to show lack of patentability in respect of two patents, and the court directed that the evidence be received. Later, in considering the master's report, which was favorable to the defendants on all issues, including. that of validity of the patents, the District Court did not pass upon the patent validity question, stating that it was "divided respecting the right of the government to attack

the validity of the patents in these proceed-521 ings \* \* " (33 F.(2) at 623). Otherwise, the District Court reversed the decision of the master on the merits and the defendants then appealed to the Supreme Court which reversed the District Court. But the Supreme Court likewise did not pass upon the question of patent validity. The case therefore constitutes no ruling of any value, on the question now before this court. In Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc., the United States was allowed to intervene in

an action brought by a patentee to collect royalties, the defense in the action being that the license agreement had been validly terminated by the defendant because it violated the Sherman Act and because the patents upon which it was based were invalid. This decision again, however, constitutes no direct ruling except that a court may properly exercise its discretion to allow Government intervention in such an action as described. The court did not rule that the Government as intervenor would be allowed to introduce evidence to the effect that the patents were invalid. Indeed, it appears from the opinion that the Government had informed the court that if allowed to intervene it would be chiefly concerned with directing the attention of the court "first to the operation of this and similar license contracts made by plaintiff, and second to the form of decree which the Government deems appropriate." It is clear from the opinion that the court did not have in mind in allowing the intervention, and was not ruling upon, the question now before this court, i.e., whether the Government can attack the validity of patents which the Government itself has, through its Commissioner, granted. Sola Electric Co. v. Jefferson Electric Co. holds that if the price fixing provisions of a patent license agreement are, if not within the protection of a lawfully granted patent monopoly, violations of the Sherman Act, a patent licensee sued for royalties may offer evidence of invalidity of the patents upon which the license agreement is founded, notwithstanding rules of estoppel, whether local of Federal, which would otherwise forbid him, because of his license agreement, to do so. But this is not a ruling that the Government itself may in a Sherman Act proceeding attack

the validity of patents which it has issued through the Commissioner. The attack in Sola Electric Co. v. Jefferson Electric Co. was by a private party. In respect of United States v. Univis Lens Co., Ethyl Gasoline Corp. v. United States, and United States v. Masonite Corp., the reliance of the Government in the instant case is upon mere dicta uttered in cases decided in terms of the question whether licensing and price fixing arrangements were or were not within the proper limits of a patent monopoly, but in which no question of validity of patents was raised.

In United States v. Bell Telephone Company, the Government relies in particular upon the following language in

the opinion of Mr. Justice Brewer:

"Suits may be maintained by the Government in its own courts to set aside one of its patents not only when it has a

proprietary and pecuniary interest in the result, but also when it is necessary in order to enable it to discharge its obligations to the public, and sometimes when the purpose and effect are simply to enforce the rights of an individual. In the former cases it has all the privileges and rights of a sovereign. The statutes of limitation do not run against it. The laches of its own officials does not debar its right. Van Brocklin v. Tennessee, 117 U.S. 151; United States v. Nashville, Chattanooga &c. Railway, 118 U.S. 120; United States v. Insley, 130 U.S. 263. But when it has no proprietary or pecuniary result in the setting aside of the patent; is not seeking to discharge its obligations to the public; when it has brought the suit simply to help an individual; making itself, as it were, the instrument by which the right of that individual against the patentee can be established, then it becomes subject to the rules governing like suits between private litigants. \* \* \* [167 U.S. 264-5]

When read alone this language seems to lend aid to the Government's contentions in support of paragraph 46 (a), but when read in the context of the opinion and decision as a whole it is clear that it is not in conflict with the holding of the Supreme Court in the case. The holding is that while the Government may, in a direct cancelation proceeding, attack a patent on the ground that it was obtained by fraud, it may not secure a determination that it was issued in error. This case is discussed in greater detail

below.

523 III

In addition to relying on the cases discussed above, the Government in support of its right to attack the validity of the patents referred to in paragraph 46 (a) makes four contentions of law. The first of these is that the Government when prosecuting an antitrust suit is acting in a sovereign as distinguished from a proprietary capacity and is hence not subject to local rules of estoppel. It is true that the Government is suing in sovereign capacity. But to say this does not answer the question before the court. The question is not really one of estoppel, which assumes a right but forbids its exercise. The question is a deeper one—whether the Government, having once issued these patents through the Commissioner of Patents, has any authority founded upon statute, case or principle to repudiate its own action in so doing, or whether the courts have power, at the instance of the Government, to review the action of the Commissioner, in issuing the patents, in the absence of

a charge of fraud in the obtaining of the same. It is to be noted in this connection that the grant of a patent is as much a sovereign act as the prosecution of an antitrust suit.

The second contention is that the present action, including the relief sought under paragraph 46(a), is not a collateral attack upon the action of the Commissioner in granting the patents but a direct attack upon price fixing, in which the fact of invalidity of the patents may incidentally be shown and determined. But again, to demonstrate that the attack is incidental to a direct attack upon price fixing does not any more answer the question raised by the present motion than to say that the attack is sovereign. The fundamental question still remains: Where does the Government find the authority to question, even in an antitrust proceeding and incidentally; its own action once taken through the Commissioner of Patents, there being no charge of fraud in the obtaining of the patents; or where does a Federal

court find its power to review the action of the Commissioner at the instance of the Government.

The cases principally relied upon by the Government under this aspect of its argument—Pratt v. Paris Gas Light & Coke Co., 168 U.S. 255 (1897) : Becher v. Contoure Laboratories, Inc., 279 U.S. 388 (1929); United States v. Bradford, 148 Fed. 413 (C.C. E.D., La. 1905), affirmed per curiam, 152 Fed. 616 (C.C.A. 5th, 1907), certiorari denied 206 U.S. 563 (1907)—do not answer these questions. The first two of these three cases correctly hold that, although a court does not have primary authority to deal with a question of patent invalidity, it may nevertheless determine such a question in a case in which it otherwise has power over the subject matter and parties. And all three of the cases correctly decide, stating their holding in general terms, that a court may incidentally determine a question of fact in a case in which the court has primary jurisdiction of the subject matter and parties even though it might not have authority to make such determination in a direct suit for that purpose. But obviously these cases do not decide the question involved in the instant motion to strike because in none of them was the incidental question raised by the very person whose action was being questioned. In Pratt v. Paris Gas Light & Coke Company the attack upon the validity of the plaintiff's patent was made by the defendant, a private party, and the same is true in Beeher v. Contoure Laboratories, Inc. In neither case was the Government seeking to repudiate and asking the court to review the Government's own action in the issuance

of the patent. In United States v. Bradford, the attack in the Federal court, in a criminal prosecution, was upon the validity of the appointment of an administrator by a state court. But the question in that case would parallel the one involved under the instant motion to strike only if the United States itself had appointed the admin-

istrator. That case is further distinguishable be-525 cause the appointment of the administrator was, according to the averments in the indictment, obtained by fraud and because the court appointing the administrator, under the facts averred in the indictment, lacked power to make the appointment so that the same was void. Thus these three cases leave unanswered the question before this court under the motion to strike paragraph

46(a) of the Government's complaint.

The Government asserts, third, that patents for invention are only prima facie valid and the courts have always permitted a party "in a proper case" to show their actual invalidity in the respects mentioned in paragraph 46(a) of the complaint. This is of course well established for private infringement cases. One accused of infringement may defend upon the ground that the accuser's patent is invalid for lack of invention. Reckendorfer v. Faber, 92 U.S. 347 (1875); Dunbar v. Myers, 94 U.S. 187 (1876). In Reckendorfer v. Faber, where the plaintiff accuser contended that the Commissioner's decision was conclusive upon the point of invention and that that question was not open to the judgment of the court, the Court rejected the contention. The Government relies on the following statement of the

"Before the commissioner is authorized to issue a patent, it must appear to him that the claimant is justly entitled to a patent; i.e., that his art, machine, or manufacture, possesses all the qualities before mentioned. The commissioner must also be satisfied, that, if it possesses these qualities, it is sufficiently useful and sufficiently important to justify him in investing it with the prima facie respect arising from the governmental approval.

"It is nowhere declared in the statute that the decision of the commissioner, as to the extent of the utility or importance of the improvement, shall be conclusive upon that

point. \* \* \* [92 U.S. at 351]"

In Dunbar v. Myers, again an infringement suit between private parties, the question of the validity of the patent 526

was raised by the defendant. The Supreme Court, reversing a ruling of the trial court that on the facts the plaintiff's patent was valid, said:

"Persons seeking redress for the unlawful use of letterspatent must allege and prove that they, or those under whom they claim, are the original and first inventors of the alleged improvement, and that the letters-patent have been infringed by the party against whom the suit is brought. Prima facie support to the first requirement is derived from the patent, if it is introduced in evidence and is in due form, provided the alleged improvement is one which in its nature is patentable. Evidence to overcome that presumption, however, is always admissible, if due notice is given by the opposite party, as required by law; and the question is now well settled, that the question whether the alleged improvement is or is not patentable, is, in an equity suit, a question for the court. [94 U.S. at 196]" In Slawson v. Grand Street R. R. Co., 107 U.S. 649 (1882), the Court took the position that lack of invention could be urged in an infringement suit even though not specifically pleaded.

But the defendants in the instant case are not accused of infringement and the Government is not so accused. The assertion of the Government and the cases cited still leave open the question whether or not the instant case is "a proper case" for determination by the court of invalidity of the patents upon which the defendants' license agreements rest. That is to say, neither the proposition stated by the Government nor the cases cited answer the question whether the Government which issued the patents can even in an antitrust suit, attack and the court review the validity of the Government's own action in issuing them. No such question was presented in the cases cited, for in those cases the attack upon the validity of the patents was made by a

private party.

The Government contends, fourth, that, assuming that in an ordinary antritrust proceeding the Government would be estopped to question the validity of the defendants' patents, nevertheless, on the facts of the instant case, the defendants are themselves estopped to insist upon the point.

It has been suggested above that the question presented under the motion to strike paragraph 46(a) cannot be

answered in terms of mere estoppel—that the ques-527 tion is more fundamental. However, the contention of the Government in this aspect of the case will be discussed in the Government's own terms. The argument of "estoppel against estoppel" divides itself into two propositions. In one the Government asserts that the Patent Office is overburdened and is also not in a position to make

a searching examination and final determination of all considerations bearing upon the right of an applicant to obtain a patent, such considerations as inventions, utility, commercial success, novelty, anticipation and the like, and that it accordingly relies heavily upon the oath and affidavits of the applicant in issuing a patent. And the Government declares that at the time the application was made to the Commissioner for issuance of the Roos "Foam" patent, No. 2,017,022, counsel for the applicant submitted an affidavit stating that more than 3 billion square feet of wallboard, embodying the Roos invention had been manufactured and sold during the preceding ten year period and that seven manufacturers, to wit, the present defendants or their predecessors, had taken licenses and were producing the board in large quantities. Evidence of commercial success, the Government points out, may properly be considered by the Commissioner in determining whether or not an alleged invention is patentable. But, contends the Government, the Commissioner had no practical means of checking the Roos figures or affidavit but evidently assumed them to be true; and no mention was made to the Commissioner, the Government avers, that the United States Gypsum Company and its licensees comprised all of the manufacturers east of the Rocky Mountains, that the license agreements under which the licensees operate provide for price fixing and had the effect, alleged by the Government in the instant case, of driving unpatented board from the market. Such matters, so it is urged, if known to the Commissioner might obviously have had a bearing upon his determination. Spelling out its argument somewhat further, the Government asserts that the primary purpose of the industry in adopting the Roos patents may not have been so much to take advantage of their novelty or utility as that they afforded a ready means of bringing erstwhile competitors together in a

of bringing erstwhile competitors together in a combination in restraint of trade; that therefore some of the data furnished the Commissioner as a basis for the issuance of the Roos patent No. 2.017,022 may have been the result of the present combination. Hence, the Government contends, "It would be a strange perversion of law if the defendants could combine to provide the evidence of be allowed to estop the Government from showing the true facts in an antitrust proceeding, since it had issued the patent[s] in reliance on that evidence."

But we think that the Government is itself "estopped" to make this contention in this case. The contention is in effect a charge that the Roos patent referred to was obtained by fraudulent misrepresentation on the part of the applicant. It is hence in conflict with the concession of the Gove ament that there is no issue of fraud in this case in respect of the obtaining of the patents which it seeks to attack under paragraph 46(a). At no point in the com-plaint, even in paragraph 46(a), does the Government charge that the patents were obtained by fraud. And it is expressly stated at another point in the Government's brief presented under the instant motion to strike that fraud is a matter not in issue in the case. Commonwealth v. Bierly, 37 Pa. Super. Ct. 496 (1908), cited by the Government in this aspect of the case, was a case in which a patent, had been issued by the Commonwealth of Pennsylvania for land on an application for a warrant (to be followed by a patent) alleging a vacancy when in fact no vacancy existed. Subsequently the Commonwealth took title to the same land for forestry purposes by means of conveyances from the holder of an older title. It was held that one claiming under the junior patent could not allege that as the junior patent was issued by the Commonwealth for a valuable consideration the Commonwealth was estopped from afterwards' acquiring by purchase the older title and setting it up to defeat its own later grant. Two considerations distinguish the case from the instant case. One is that the land

laws of the Commonwealth neither required nor authorized, upon the filing of an application for a warrant, an independent investigation by the land office to ascertain the truth of the basic fact asserted in it. The warrant issued as of course, and the responsibility for the result that, if the land had been previously appropriated no title passed, was left to rest with the applicant who had voluntarily assumed it. The other consideration is that the rule of estoppel of a grantor to dispute the title of his grantee, as by setting up a prior paramount title in himself or in a third person, applies only to solemn deeds with covenants of seizin and warranty or for quiet enjoyment, and not to mere quitclaims containing none of the covenants referred to. A patent to an invention is not issued without investigation but on the contrary after consideration by expert patent examiners in the office of the Commissioner: and the grant of a patent to an invention is more than a mere quitclaim. There is set forth in the margin, supra, a copy of Roos patent No. 2,017,022 which is in the usual

form in which the United States issues letters patent. The same indicates on its face due examination and a solemn

grant,

The second proposition of the Government under its fourth contention of law is this: It is provided in each of the license agreements involved in the instant case that the licensees, who with the United States Gypsum Company comprise all of the manufacturers east of the Rocky Mountains, will not contest the validity of the United States Gypsum Company's patents; and in certain agreements of October, 1929, the licensees in acknowledging the validity of patents already issued purport also to acknowledge the validity of any letters patent which may be granted or issued upon pending applications. In effect, therefore, the Government urges, the United States Gypsum Company has not only asked the Government through the Commissioner to issue the patents in suit upon its representations of fact but also

it has combined with the licensee defendants to stop any normal test of their validity. Ordinarily, the Government asserts, the check upon the determinations of the Commissioner is the infringement suit; an invalid patent will either not be used at all by the inventor or if used will be quickly challenged by others interested in the art, since Rev. Stat. § 4920 (1875), 35 U.S.C. § 69 (1940), fully recognizes the rights of an alleged infringer to contest the validity of a patent. But in the circumstances of the instant case, says the Government, no one outside the group of licensee defendants is likely to hazard the expense necessary to make an effective challenge against "a powerful combination carefully fenced in behind, not one, but many patents in the art." This is in effect an argument by the Government that the defendants are not in court with clean hands. It was so put in the oral argument on this motion. The defendants therefore, it is urged, have estopped themselves to insist that the Government may not attack the validity of the patents, and the matter is now at large, But there is nothing inherently unclean about an agreement by a licensee not to contest the validity of his licensor's patent. Indeed there may be circumstances in which such an agreement is natural and wholesome, as, for example, where after expensive delaying litigation between patentees and alleged infringers it is desired by such parties to settle their controversies by an agreement which will avoid future litigation. Such agreements not to contest the validity of patents are moreover not illegal, and the Government does not make an outright contention that they are. It suggests that they may be, or ought to be,

treated as void as against public policy. But the only authority cited for this is Pope Manufacturing Co. v. Gormully, 144 U.S. 224 (1892). In that case the defendant had been granted a license to manufacture and sell stated patented devices under patents owned by the plaintiff and had agreed not to import, manufacture or sell devices covered by certain other patents, and had also agreed that he

would not contest the validity of the plaintiff's patents or his title thereto. There was a further provision that if after termination of the license agreement the defendant manufactured, sold or used any devices covered by the patents involved in the agreement, the plaintiff might treat him as breaching the contract or as an infringer and might have an injunction issued by any court without notice. The action was for an accounting and injunction, it being asserted that the defendant had imported, manufactured or sold devices covered by "the other patents." But it was found that the defendant, due to the plaintiff's artifice, had signed the license agreement without comprehending its import so far as concerned the "unusual or oppressive" stipulations of that portion which forbade the defendant to contest the validity of or title to the plaintiff's patents; bound him to agree not to import, manufacture or sell devices covered by other patents, and subjected him to an injunction without notice. The Court held that, because of the oppressive character of the contract and the apparent artifice used by the plaintiff in securing the defendant's consent to it, the plaintiff was not in court with clean hands and could therefore not seek equitable relief. But the Court expressly declined to pass upon the question whether the contract was invalid against public policy, i.e., it refused to answer the question whether the defendant could estop himself from disputing patents which might be void or to which the plaintiff might have no title. It is to be noted further that if, as the Government suggests, an agreement by a licensee not to contest. the validity of the licensor's patent is void as against public policy, then the defendant licensees in the instant case are free to contest the validity of the patents, and therefore the premise of the Government's argument, that the Government ought not be forbidden to contest the validity of the patents for the reason that the normal test by individuals in infringement suits has been foreclosed, falls. It is to be noted also that the contention of the Government that the licensee defendants have bound themselves not to contest the validity of the patents and that no other persons

are likely to do so and that therefore the Government ought to be permitted itself to raise the question of validity, is an argument of what the law ought to be with respect to the right of the Government to repudiate the action of its own Commissioner of Patents and the power of the courts to review the action of the Commissioner except where induced by fraud; it is not an argument as to what the law is.

On that subject further comment is made below.

532 IV

The answer to the question presented by the motion to strike or for partial judgment dismissing paragraph 46(a) lies not in the contentions made, and authorities cited, by the Government, but in considerations of a more

fundamental nature:

1. The United States is an entity of conferred, not inherent, powers. Its authority is found in the objective law set up by the people in the Constitution, in statutes, in judicially recognized principles. What is true of the United States in this respect is true of its governmental departments and agencies. The Constitution, Art. I, § 8, Clause 8, gives Congress power "To promote the Progress of Science and useful Arts, by securing, for limited Times, to Authors and Inventors, the exclusive Right to their respective writings and Discoveries." The statute authorizing the issuance

of patents provides that:

"Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof that not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than one year prior to his application, and not in public use or on sale in this country for more than one year prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor. [Rev. Stat. § 4886 (1875), amended 29 Stat. 692 (1897), 46 Stat. 376 (1930), 53 Stat. 1212 (1939), 35 U.S.C. § 31 (1940)]"

The United States acts in its sovereign capacity in issuing patents under these constitutional and statutory provisions. There is nothing in them or in the Sherman Act or in judicially recognized principles that permits it to repudiate patents or to ask the courts to do so after their issuance.

except for fraud in the obtaining of the patents. The right to cancel for fraud is mentioned below.

2. The attack upon the validity of the patents under paragraph 46(a) involves a breach, as between the Government and the patentees and those dealing with the pat-

entees, of the Government's grant. In issuing the patents through the Commissioner the Government

upon due examination . . . adjudged [the claimants) to be justly entitled to a patent under the Law" and thereupon made a solemn grant. When an alleged infringer attacks the validity of a patent under Rev. Stat. § 4920 (1875), 35 U.S.C. § 69 (1940), he is breaking no grant of his own since he did not issue the patent. No private litigant could expect relief in a court of equity upon the premise of a broken promise on his own part. A fortiori the Government should not. On the contrary it should scrupulously keep and perform each of its own covenants. One of the first objectives and essentials of good government is order and certainty in relations between government and citizen. This cannot be secured if the Government itself is not to be depended upon to abide its grants, even if they have been improvidently or erroneously made. The attack of the Government upon the patents under paragraph 46(a) is based upon the extraordinary premise that the Government can in one department issue a grant and in another question its own action, in the absence of charges of fraud in inducing the action. Common principles of justice and fairness in dealings between patent applicants and the Government give patentees a right to assume that their patents are valid insofar as any attack on them by the Government which issued them is concerned, unless the attack is for fraud in the obtaining of the patents.

In ruling that the Government cannot attack, nor the court review, in this proceeding the validity of the patents, the court does not assume to justify any misuse of the patents as a cloak for illegal restraints of trade or price fixing beyond the proper limits of a patent monopoly. If such conduct be shown, as charged, it is amenable to law. But that is a different aspect of this case; and two wrongs do not make a right. That the defendants may be shown to have misused the patents is no warrant for the Government's repudiating its own assurance that they were issued upon due examination and according to law and conferred an exclusive right for a given period of years. As pointed.

out above, in the present aspect of the Government's case, i.e., that arising under paragraph 46(a), the patents are not attacked as invalid because illegally

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used; on the contrary illegal use is predicated upon their invalidity, and this is not charged in the complaint as due to any fraud or overreaching, but only to erroneous action

of the Commissioner in issuing the patents.

3. It is settled law that although the Federal courts may compel an officer or agency in the executive branch of the Government to perform a ministerial duty of to refrain from threatened action clearly beyond legal authority and may, under the due process clause of the Constitution, examine upon a bill in equity into governmental action alleged to have been taken wholly without jurisdiction, or to have been arbitrary or induced by fraud, the courts do not have authority in the absence of statute to review the exercise of discretion or judgment by officers or agencies of the executive branch of the Government. Welch v. Obispo Oil Co., 301 U.S. 190 (1937); Leach v. Carlile, 258 U.S. 138 (1922); Houston v. St. Louis Independent Packing Co., 249 U.S. 479 (1919); see American T. & T. Co. v. United States, 299 U.S. 232, 236 (1936). This is the theory which underlies the decision of United States v. Bell Telephone Company, 167 U.S. 224 (1897), certain language of which has been quoted above as relied upon by the Government in support of its contentions herein. That was a suit by the United States to cancel a patent to a telephone transmitter upon two separate grounds, one that the patent had been obtained by fraud, the other that the patentee was not the original and first inventor. It was held that the Government must fail as to the first ground because fraud had not been established, and that as to the second it must fail also, for the reason that "The judgment of the Patent Office, the tribunal established by Congress to determine such questions, was adverse to the contention of the Govern-

ment, and such judgment cannot be reviewed in this suit." (167 U.S. at 264) In the course of the opinion the Court discussed two previous cases, United States v. Bell Telephone Co., 128 U.S. 315 (1888), and United States v. American Bell Telephone Co., 159 U.S. 548 (1895), saying there was nothing in either of them to conflict with the views expressed in the opinion. In con-

cluding its opinion the Court said:

"In United States v. Telephone Co., supra, [the reference is to the first of the two cases just mentioned] it was decided that where a patent for a grant of any kind issued by the United States has been obtained by fraud, by mistake or by accident, a suit by the United States against the

<sup>6</sup> For a description of matters appropriate for judicial review see Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266, 274-8 (1983).

patentee is the proper remedy for relief, and that in this country, where there is no kingly prerogative, but where patents for land and inventions are issued by the authority of the Government, and by officers appointed for that purpose, who may have been imposed upon by fraud or deceit, or may have erred as to their power, or made mistakes in the instrument itself, the appropriate remedy is by pro-

ceedings by the United States against the patentee."

But while there was thus rightfully affirmed the power of the Government to proceed by suit in equity against one who had wrongfully obtained a patent for land or for an invention, there was no attempt to define the character of the fraud, or deceit or mistake, or the extent of the error as to power which must be established before a decree could be entered cancelling the patent. It was not affirmed that proof of any fraud, or deceit, or the existence of any error on the part of the officers as to the extent of their power, or that any mistake in the instrument was sufficient to justify a decree of cancellation. Least of all was it intended to be affirmed that the courts of the United States, sitting as courts of equity, could entertain jurisdiction of a suit by the United States to set aside a patent for an invention on the mere ground of error of judgment on the part of the patent officials. That would be an attempt on the part of the courts in collateral attack to exercise an appellate jurisdiction over the decisions of the Patent Office, although no appellate jurisdiction has been by the statutes conferred. We are of opinion, therefore, that the question, as stated, is not open for consideration in this case. \* at 269-2701

The Court said also in the course of the opinion:

the Government is as much bound by the laws of Congress as an individual, and when Congress has created a tribunal to which it has given exclusive determination in the first instance of certain questions of fact and has specifically provided under what circumstances that determination may be reviewed by the courts, the argument is a forcible one that such determination should be held conclusive upon the Government, subject to the same limitations as apply in suits between individuals. [167 U.S. at 268]"

The decision of course does not constitute a direct ruling that the Government cannot seek in an antitrust proceeding,

incidental to determination of the primary question of violation of the Sherman Act, a judicial determination of the invalidity of patents relied upon by the defendants as a basis of license agreements themselves urged in defense of the charge of Sherman Act violation.

But the case does reflect the general principle that the Federal courts sitting in equity do not have power in the absence of statute to set aside at the instance of the Government a determination made by a tribunal or officer in the executive branch of the Government except when such determination has been induced by fraud. And the reasoning of the Court in the case is as apt for incidental attack upon

the validity of patents as for direct attack.

There are similar rulings by the United States Supreme Court in respect of determinations of the Land Office. In United States v. Coronado Beach Co., 255 U.S. 472 (1921), the Government sought by a bill in equity to ascertain the rights of private parties in an island in the harbor of San Diego, California, and to condemn the island for public purposes. The Government contended that private ownership went only to the shore line, the Beach Company that it included tide lands. The title of the Beach Company was derived from a Mexican grant of 1846 to one Carrillo, a Mexican citizen, to whose rights the Beach Company had succeeded. Intermediate holders of the title had in 1852 petitioned Commissioners to settle Private Land Claims appointed under an Act of March 3, 1851, 9 Stat. 631, to confirm to them the land in question, and although this petition was rejected by the Commissioners, on appeal to the United States District Court the title was declared good and con-. firmed, the decree stating the boundaries on the north, east and south as in the original grant, and "west by the anchorage for ships, according to the documents of title and map to which reference is had." In 1869 a patent was issued reciting this decree, a return with a plat of a survey approved under the Act of 1851, and giving and granting the land described in the survey. The Government attempted to show that the extent of the land patent as thus confirmed was erroneous. The Court held that this was not allowable. Speaking for the Court Mr. Justice Holmes said:

by the anchorage for ships' and although it well may be that in view of the purpose set out in his petition and the circumstances the grant could have been construed more narrowly, that was a matter to be passed upon and when the decree and the patent went in favor of the grantee it is too late to argue that they are not conclusive against the United States. It is said that the field notes, not put in evidence at the trial, show that the deep water line was not surveyed, but was taken from the Coast Survey maps. But however arrived at it was adopted by the United States for

its grant and it cannot now be collaterally impeached.

[255 U.S. at 488]."

The Government's attack in United States v. Coronado Beach Co. upon the land patent for error in issuing it was direct. A fortiori an indirect or collateral attack is not allowable. In Burke v. Southern Pacific R. R. Co., 234 U.S. 669 (1914), there was a bill in equity to establish a right to lands. The plaintiff claimed under a clearly junior title but asserted that the grant to the defendant Railroad Company was invalid because the lands contained minerals. Mineral land was excepted by statute from grants. The District Court dismissed the bill and upon certification by the Circuit Court of Appeals of questions to the Su-

preme Court that Court said:

"The exclusion of mineral lands is not confined to railroad land grants, but appears in the homestead, desert-land, timber and stone, and other public-land laws, and the settled course of decision in respect of all of them has been that the character of the land is a question for the Land Department, the same as are the qualifications of the applicant and his performance of the acts upon which the right to receive the title depends, and that when a patent issues it is to be taken, upon a collateral attack, as affording conclusive evidence of the non-mineral character of the land and of the regularity of the acts and proceedings resulting in its issue, and, upon a direct attack, as affording such presumptive evidence thereof as to require plain and convincing proof to overcome it. Smelting Co. v. Kemp, 104 U.S. 636, 641; Steel v. Smelting Co., 106 U.S. 447; Maxwell Land Grant/Case, 121 U.S. 325, 379-381; Heath v. Wallace, 138 U.S. 573, 585; Noble v. Union River Logging Railroad, 147 U.S. 165, 174; Burfenning v. Chicago, &c. Railway Co., 163 U.S. 321, 323. In this respect no distinction is recognized between patents issued under railroad land grants and those issued under other laws; nor is there any reason for such a distinction.

"Of course, if the land officers are induced by false proofs to issue a patent for mineral lands under a non-mineral-land law, or if they issue such a patent fraudulently or through a mere inadvertence, a bill in equity, on the part of the Government, will lie to annul the patent and regain the title, or a mineral claimant who then had acquired such rights in the land as to entitle him to protection may maintain a bill to have the patentee declared a trustee for him; but such a patent is merely voidable, not void, and cannot be successfully attacked by strangers who had no interest in the land at the time the patent was issued and

were not prejudiced by it. [Citing cases] [234 U. S. at 691-2]"

538 4. The Government's contentions in respect of the right to attack the validity of the patents under paragraph 46(a) of the complaint really amount to an assertion not that it is, but that it ought to be, the law that notwithstanding the grant of a patent by the Commissioner of Patents the Government may test the validity of the patent in the courts. The Commissioner and his staff are · asserted to be incapable, because of press of business and the conditions under which the Patent Office operates, including unavoidable ignorance of anticipation, of reaching conclusively dependable determinations in respect of the right to a patent; hence recourse to the courts to correct the Commissioner's action should be allowed, so it is urged. It is to be noted that this argument is as valid for direct attack as for incidental. If the assertions of the Government in respect of the limitations of the Patent Office are correct —upon this the court does not assume to pass—and if such limitations cannot otherwise be corrected, a case may perhaps be made for the devising of some test outside the Patent Office of the validity of patents. But it does not follow that it is within the proper function of the courts to devise it. There is of course a recognized place for growth of the law through judicial decision in the "interstitial" or borderline case, but radical departures or innovations are not properly made by courts. Judges are not appointed in representative capacity for the purpose of law making; and judicial innovations upon the law are especially to be avoided when they would upset transactions entered into on the 1 ith of the law as it is. Conceivably there should be Congressional action creating a statutory right in the Government to test in the courts the correctness of determinations of the Commissioner of Patents, some such remedy perhaps as is now afforded patent applicants under Rev. Stat. § 4915 (1875), 35 U.S.C. § 63 (1940): But such a remedy if created by statute would undoubtedly be made prospective in effect, that is to say, would apply only to patents issued after the passage of the act. Moreover, the actions permitted under such a statute would prop-

actions permitted under such a statute would prop-539 erly be made subject to a limitation in time, so that after a given period the rights under a patent would be secure to the patentee and those dealing with him so far as interference by the Government was concerned. It is not within the proper function of courts to open the door by judicial innovation to Government attack on patents, retroactive in effect and without limitation in time, and thus to unsettle industrial security so far as it is based on the patent system.

V

There is auhority to the effect that motions under Rule 12(f) are not an appropriate means of testing the legal sufficiency of a pleading. Hartford-Empire Co. v. Glenshaw Glass Co., 47 F. Supp. 711, 6 Fed. Rules Serv. 12 b. 51 (W.D. Pa. 1942); Dysart v. Remington Rand, 31 F. Supp. 296, 2 Fed. Rules Serv. 12 b. 51 (D. Conn. 1939). Therefore the motion now before the court is ruled on in terms of the alternative motion for a partial judgment, and the court will order a dismissal of that portion of the Government's complaint contained in paragraph 46 (a) except the first and last sentences of that paragraph. It is true that, as suggested by the defendants, the last sentence is in somewhat conclusional terms, but the court thinks not objectionably so under the broad allowances of the Federal Rules of Civil Procedure with respect to pleadings.

In deciding as the court does that the Government cannot properly attack the validity of patents as it seeks to do under paragraph 46 (a) of the complaint, it is not ruled that all evidence on the topics mentioned in those portions of paragraph 46 (a) other than the first and last sentences is necessarily inadmissible on some issue in the case other than that of the validity of the patents. It occurs from time to time in the trial of cases that evidence inadmissible in respect of one issue is admissible in respect of another. So far as the right of the Government to attack the validity of the patents is concerned the court rules definitely that

it has no such right, and the court no authority to pass on the same; that the patentees and those dealing with them had and have a right to assume the validity of the patents so far as any attack by the Government on its own grant is concerned. But in respect of other issues the relevancy, materiality and competency of evidence offered, whether or not it touches the topics mentioned in paragraph 46(a), will be passed upon at the time of the offer.

I am authorized to state that Judge Garrett concurs in the foregoing opinion and decision:

HAROLD M. STEPHENS. FINIS J. GARRETT.

BLAND, J., dissenting:

In my view, at makes little difference whether or not paragraph 46(a) of the complaint is stricken, but the im-

plication drawn from the striking of it requires that I

briefly express my views in dissenting.

The Sherman Anti-Trust Law forbids illegal combinations or monopolies which restrain interstate trade. It is well-settled that an inventor or his assignee has the right to a monopoly in the manufacture and sale of his patented article. United States v. General Electric Co. et al., 272 U.S. 476 (1926). However, such a monopoly has been declared to be a "limited monopoly." Oxford Varnish Corporation et al. v. Ault & Wiborg Corporation, 83 F. (2d) 764 (C.C.A. 6, 1936); see also Bement v. National Harrow Co., 186 U.S. 70, 91 (1902). Thus it is seen that when Congress passed the Sherman Act, we had two conflicting laws on the subject of monopoly. It is the duty of the courts, if possible, to harmonize the two statutes in such a way as

to give force and effect to both and arrive at the true intent of Congress in the enactment of the anti-trust

law.

541

As I understand it, the chief reliance of the defendants in support of their contention that the Government in this case has no right, through its Department of Justice, to attack the validity of a patent, is upon United States v. Bell Telephone Company, 167 U.S. 224 (1897). The holding in that case, as pertinent to the inquiry here, is in the

following language:

"Suits may be maintained by the Government in its own courts to set aside one of its patents not only when it has a proprietary and pecuniary interest in the result, but also when it is necessary in order to enable it to discharge its obligations to the public, and sometimes when the purpose and effect are simply to enforce the rights of an individual. In the former cases it has all the privileges and rights of a sovereign. The statutes of limitation do not run against it. The laches of its own officials does not debar its right. Van Brocklin v. Tennessee, 117 U.S. 151; United States v. Nashville, Chattanooga &c. Railway, 118 U.S. 120; United States v. Insley, 130 U.S. 263. But when it has no proprietary or pecuniary result in the setting aside of the patent; is not seeking to discharge its obligations to the public; when it has brought the suit simply to help an individual; making itself, as it were, the instrument by which the right of that individual against the patentee can be established. then it becomes subject to the rules governing like suits between private litigants. • "

This case is not authority for a holding that the Government in the instant action, when acting for the public through the Department of Justice, being duly empowered by Congress to enforce the anti-trust laws as against what it alleges is a combination built around certain invalid patents, is estopped from challenging the validity of said patents. On the contrary, the mandate of the Sherman Act is that, under the direction of the Attorney General by appropriae officers, proceedings shall be instituted to remedy the wrongs brought about by a violation of the Sherman Act. The statute calls into action and authorizes

proceedings in which it may be determined whether the Sherman Act is being violated or "valid patent

rights" are being exercised.

The exact question presented here has never been directly presented before as far as I know; and since I am convinced that there must be some new declaration of law made by our highest court as to where the line of demarcation rests between the exercise of valid patent rights and acts that are in violation of the anti-trust laws, I feel that such cases as Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173 (1942), should be given more consideration than has been accorded them by the majority. In that case (a royalty suit) the defendant-licensee was, under the decisions, when the case came to the Supreme Court, barred from pleading the invalidity of the patent, but it pleaded that the agreement was in violation of the anti-trust laws and that therefore it had a right to say that the agreement was unlawful if the patent was invalid. The Supreme Court upheld this contention and stated:

"Local rules of estoppel which would fasten upon the public as well as the petitioner the burden of an agreement in violation of the Sherman Act must yield to the Act's declaration that such agreements are unlawful, and to the public policy of the Act which in the public interest precludes the enforcement of such unlawful agreements.

## It also stated:

" \* We granted certiorari \* \* the question being of importance to the administration of the patent laws and

the Sherman Anti-Trust Act."

As a basis for my conclusion, I rely also upon the following authorities: Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488 (1942); United States v. Univis Lens Co., Inc., et al., 316 U.S. 241 (1942); United States v. Masonite Corporation et al., 316 U.S. 265 (1942); and Becher v. Contoure Laboratories, Inc., et al., 279 U.S. 388 (1929). In the last-cited case the following is found:

543 "• Again, even if the logical conclusion from the establishing of Oppenheimer's claim is that

Becher's patent is void, that is not the effect of the judgment. Establishing a fact and giving a specific effect to it by judgment are quite distinct. A judgment in rem binds all the world, but the facts on which it necessarily proceeds are not established against all the world, Manson v. Williams, 213 U.S. 453, 455, and conversely establishing the

facts is not equivalent to a judgment in rem.

"That decrees validating or invalidating patents belong to the Courts of the United States does not give sacrosanctity to the facts that may be conclusive upon the question in issue. A fact is not prevented from being proved in any case in which it is material, by the suggestion that if it is true an important patent is void—and, although there is language here and there that seems to suggest it, we can see no ground for giving less effect to proof of such a fact than to any other.

The last-cited authority is important in view of my conclusion that the fact of invalidity is pertinent to the issue here involved aside from the question of the declaration of a patent's invalidity. The invalidity of defendants' patents, if any of them are invalid, is of concern here only in so far as it goes to the determination of the right of defendants to rely upon a patent monopoly for acts which would other-

wise, admittedly, be contrary to the Sherman Act.

When the Department of Justice attempts to take action against a monopoly, it frequently occurs that the defendants contend that they have a right to have a monopoly and to restrain trade because their conduct is nothing more than the exercise of their rights under the patent laws. So, defendants file an answer, as they did in the instant case, showing that they rely upon the ownership of "valid patents" as an excuse for their contracts of price-fixing and trade-restraining. When such a defense is interposed, it is my view that, whether or not the Government has pleaded that the patents are invalid and regardless of the fact that they are to be regarded as prima facie valid, the Government has the right to show if it can that the patents

ment has the right to show, if it can, that the patents relied upon are either invalid (concerning which the defendants would probably have more knowledge than anyone else) or are of such character in their relation to the prior art as to be no justification for violating the

Sherman Act.

It seems to me that any other conclusion is anomalous. Can a defendant say, "Yes, I would be violating the Sherman Act if I were not acting under my valid patent rights," and then close the mouth of the Government to show that

the patents are such as to be no justification for such a violation? In attacking the validity of the patents, as the Government seeks to do in the instant case, it is not attempting to establish invalidity for the purpose of cancellation or for the purpose of protecting any other inventor or anyone who wishes to manufacture defendants' products. It is attempting to show, in "discharge of its obligations to the public" under statutory mandate, the nature of the patents for the purpose of showing that they are no justification for the alleged monopoly and restraint of trade, whether valid or invalid.

In this view, it seems to me that the decisions relied upon by the majority are no authority for holding that the Government, under such circumstances, has no right to question the validity of the patents for the purposes stated. The result of the ascertainment of invalidity in the instant case is not the result sought in any decided case relied upon by the majority. It is the fact of invalidity which goes to the question as to whether or not the defendants in the instant case are using the patents as a smoke-screen (and I am not implying that they are) in order to carry on what the Government charges is a violation of the law.

. If the striking of paragraph 46(a), which alleges that

the patents relied upon are invalid, implies that the court does not have the right to accept evidence as to the nature of the patents relied upon, even though it shows them to be invalid, I think the striking would be erroneous. If the paragraph is stricken because it is unnecessary, or if the evidence of invalidity could be accepted for other purposes, then it is of little consequence what

happens to paragraph 46(a).

I need not here discuss the broader aspect of the question as to whether or not the General Electric case (which, unlike the instant case, involved the conduct of principal and agent) should be modified where competitors and not bona fide agents are concerned, in the light of the present trend of decisions, and as to whether a valid patent monopoly should be held not to be one which encompasses the scope contained in the allegations of the Government. I have matured no view on this phase of the case.

For reasons hereinbefore stated, I feel compelled to dissent from the conclusion reached by the majority on the

motion to strike and for partial judgment.

546 In the District Court of the United States for the District of Columbia

Holding a Three Judge Statutory Court.

Justice Harold M. Stephens of the U. S. Court of Appeals for the District of Columbia, (Presiding), and Judge Oscar E. Bland and Judge Finis J. Garrett of the U. S. Court of Customs and Patent Appeals, designated as Justices of the District Court of the United States for the District of Columbia.

[File endorsement omitted.]

Civil Action No. 8017. UNITED STATES OF AMERICA

UNITED STATES GYPSUM COMPANY, ET AL.

Order on Motion to Strike Paragraph 46(a) of the Government's Complaint, or, in the alternative, for Partial Judgment dismissing that Part of the Government's Claim Contained in that Paragraph.

Filed Nov. 15, 1943

Upon consideration of the motion of the defendants herein under Rule 12(f) of the Federal Rules of Civil Procedure to strike paragraph 46(a) of the complaint, as amended, upon the ground that the allegations thereof are immaterial and impertinent to the issues herein, or in the alternative for partial judgment pursuant to Rules 12(b) and 56(b) of said Federal Rules dismissing that part of the plaintiff's claim contained in said paragraph 46(a) upon the ground that as a matter of law the plaintiff may not attack the validity of patents in these proceedings in the manner attempted in said paragraph; and upon consideration of the plaintiff's opposition to said motion and alternative motion; and after hearing oral argument thereon by the attorneys for the plaintiff and the defendants; and after considering the brief submitted by said attorneys, it is by the Court this fifteenth day of November, 1943,

Adjudged that the defendants' alternative motion for partial judgment pursuant to Rules 12(b) and 56(b) of the Federal Rules of Civil Procedure for dismissal of that

part of the plaintiff's claim contained in paragraph 46(a) of the complaint, as amended upon the ground that as a matter of law the plaintiff may not attack the validity of patents in these proceedings in the manner attempted in said paragraph, be and the same is hereby

granted, except as to the first and last sentences of said paragraph, and the plaintiff's claim so far as it is contained in said paragraph 46(a) of the complaint, as amended, except the first and last sentences of said paragraph, is hereby dismissed.

By the Court.

HAROLD M. STEPHENS, Justice Presiding.

548 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.] .

Supplemental answer of United States Gypsum Company, Sewell L. Avery and Oliver M. Knode

Filed Nov. 15, 1943

United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, defendants herein, answering the first and last sentences of paragraph 46(a) of the Complaint, as amended:

Deny each and all of the averments in the first and last sentences of paragraph 46(a) of the Complaint, as amended, except that some of the claims of some of the patents cover processes or machines and except that said defendants beg leave to refer to the patents involved in the license agreements for the coverage thereof.

November 15, 1943.

Bruce Bromley, Bruce Bromley.

Attorney for Defendants, United States Gypsum Company, Sewell L. Avery, and Oliver M. Knode.

Service Roscoe T. Steffen, Nov. 15, 1943.

acknowledged.

549 In the District Court of the United States

[Title omitted.]

[File endorsement omitted.]

Supplemental answer of Certain-teed Products Corporation and Henry J. Hartley.

Filed Nov. 17, 1943 .

Certain-teed Products Corporation and Henry J. Hartley, defendants herein, answering the first and last sentences of paragraph 46(a) of the Complaint, as amended: Deny each and all of the averments in the first and last sentences of paragraph 46(a) of the Complaint, as amended, except that some of the claims of some of the patents cover processes or machines and except that said defendants beg leave to refer to the patents involved in the license agreements for the coverage thereof.

November 17, 1943.

F. W. H. Adams,
F. W. H. ADAMS,
Attorney for Defendants,
Certain-teed Products Corporation
and Henry J. Hartley.

550 In the District Court of the United States
[Title omitted.]

[File endorsement omitted.]

Supplemental answer of Ebsary Gypsum Company and Frederick G. Ebsary to paragraph 46(a) of the complaint as amended

Filed Nov. 17, 1943

Ebsary Gypsum Company and Frederick G. Ebsary, defendants herein, answering paragraph 46(a) of the

Complaint as amended:

Deny each and every allegation of said paragraph 46(a), of the Complaint as amended, except admit that some of the claims of some of the patents cover processes or machines.

November 16, 1943.

Alfred W. Varian,
ALFRED W. VARIAN,
Attorney for Defendants,
Ebsary Gypsum Company and
Frederick G. Ebsary.

551 In the District Court of the United States

[Title omitted.]
[File endorsement omitted.]

Supplemental answer of the National Gypsum Company and Melvin H. Baker

Filed Nov. 17, 1943

National Gypsum Company and Melvin H. Baker, defendants herein, answering the first and last sentences of paragraph 46(a) of the Complaint as amended:

Deny each allegation in the first and last sentences of paragraph 46(a) of the Complaint as amended, except

that said defendants admit that some of the claims of some of the patents cover processes or machines.

November 16, 1943.

Elmer E. Finck,
ELMER E. FINCK,
Attorney for Defendants,
National Gypsum Company
and Melvin H. Baker.

552 In the District Court of the United States

[Title omitted.]
[File endorsement omitted.]

Supplemental answer of the Celotex Corporation and Bror G. Dahlberg

Filed Nov. 18, 1943

The Celotex Corporation and Bror G. Dahlberg, defendants herein, answering the first and last sentences of

paragraph 46(a) of the Complaint, as amended:

Deny each and all of the averments in the first and last sentences of paragraph 46(a) of the Complaint, as amended, except that some of the claims of some of the patents cover processes or machines and except that said defendants beg leave to refer to the patents involved in the license agreements for the coverage thereof.

November 18, 1943.

Ernest H. Oliver,
ERNEST H. OLIVER,
Attorney for Defendants,
The Celotex Corporation and
Bror G. Dahlberg.

Now, Nov. 18, 1943, service accepted.

EDWARD KNUFF,
Special Assistant to Attorney General,
Attorney for Plaintiff.

553 In the District Court of the United States

[Title omitted.]
[File endorsement omitted.]

Supplemental answer of Newark Plaster Company and Frederick Tomkins

Filed Nov. 19, 1943

Newark Plaster Company and Frederick Tomkins, defendants herein, answering the first and last sentences of paragraph 46(a) of the Complaint as amended:

Deny each and all of the averments in the first and last sentences of paragraph 46(a) of the Complaint, as amended, except that some of the claims of some of the patents cover processes or machines and except that said defendants beg leave to refer to the patents involved in the license agreements for the coverage thereof.

Dated November 18, 1943.

BENJAMIN P. DEWITT, JAMES O'DONNELL, JR., By James O'Donnell, Jr.,

Attorneys for Defendants Newark Plaster Company and Frederick Tomkins, 305 Hibbs Building, Washington, D. C.

Service of a copy of the foregoing Supplemental Answer of Defendants Newark Plaster Company and Frederick Tomkins is hereby acknowledged, this 19th day of November, 1943.

EDWARD KNUFF,

Assistant to the Attorney General for Plaintiff.

554 In the District Court of the United States

[Title omitted.]
[File endorsement omitted.]

Supplemental answer of Samuel M. Gloyd doing business
– as Texas Cement Plaster Co.

Filed Nov: 29, 1943

Comes now Samuel M. Gloyd doing business as Texas Cement Plaster Company and for his answer to the first and the last sentences of paragraph 46a of the amended complaint states that he denies said averments except that some claims of some patents cover machines or processes, as shown by the patents:

DAVID I. JOHNSTON,
GEO. E. H. GOODNER,
Attorneys for Samuel M. Gloyd
doing business as Texas
Coment Plaster Company.

I certify that I served copies of this supplemental answer on counsel for the plaintiff.

DAVID I. JOHNSTON.

556 In the District Court of the United States
For the District of Columbia
Civil Action No. 8017
UNITED STATES OF AMERICA, PLAINTIFF

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN-H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS.

Reporter's transcript of proceedings Statement by Mr. Steffen

Par. 46(a) asserted or averred the particular grounds upon which we will attack the validity of the five patents which are now thrown in issue by virtue of the

proposed amendment.

Those, as I say, are the five patents which are the basic article patents on which the said price-fixing agreements have been based. There may be other patents, but so far we are calling attention at this moment to, and the only thing we are raising in this trial as to validity, is these particular five patents, and we have stated there, in great particularity, the reasons why we think those patents are invalid, and the points upon which we expect to offer evidence.

558-559 In the District Court of the United States
For the District of Columbia
Civil Action No. 8017
UNITED STATES OF AMERICA, PLAINTIFF.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM.
COMPANY; CERTAIN-TEED PRODUCTS CORPORATION;
THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M.
GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY;
OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HFNRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING, WASHINGTON, D. C., Monday, October 18, 1943. The above-entitled cause came on for hearing at 10:00 o'clock a.m., before Honorable Harold M. Stephens, Honorable Oscar E. Bland and Honorable Finis J. Garrett, sitting as District Court of the United States for the District of Columbia, pursuant to adjournment.

Appearances: On behalf of the Plaintiff: Roscoe T. Steffen, Esq., and Edward Knuff, Esq., Special Assistants to the Attorney General of the United States.

On behalf of the Defendants: Bruce Bromley, Esq., 560 New York, New York, George S. Collins, Esq., New York, N. Y., and Cranston Spray, Esq., Chicago, Illinois, for defendants United States Gypsum Company, Avery and Knode. Elmer E. Finck, Esq., Buffalo, New York, and Nicholas J. Chase, Esq., Washington, D. C., for defendants National Gypsum Company and Baker. F. W. H. Adams, Esq., New York, New York, for defendants Certain-teed Products Corporation and Hartley. Ernest H. Oliver. Washington, D. C., for defendants The Celotex Corporation and Dahlberg. Joseph P. Tumulty, Jr., Esq., of Tumulty. & Tumulty, Washington, D. C., for defendants Ebsary Gypsum Company, Inc., and Ebsary. James O'Donnell, Jr., Esq., Washington, D. C., for defendants Newark Plaster Company and Tomkins. Scott P. Crampton, Esq., and David I. Johnston, Esq., Oklahoma City, Okla., for defendant Glovd.

561 PROCEEDINGS

Justice STEPHENS. Are there any preliminary matters, gentlemen, before we proceed with the argument on the motion to strike Paragraph 46(a)?

Mr. BROMLEY. I believe not, sir.

Justice STEPHENS. How much time do you wish, Mr. Bromley?

Mr. BROMLEY. I should think our side would not require more than an hour, sir.

Justice Stephens. Would that be sufficient for you, Mr. Steffen?

Mr. STEFFEN. Yes.

Justice STEPHENS. Now the defendants have also requested opportunity to make an argument on a motion for a Bill of Particulars. Do you wish to be heard on that this morning?

Mr. STEFFEN. I think we might well, yes.

Justice STEPHENS. How much time do you want on that?

Mr. Steffen. I think maybe half to three-quarters of an hour would be sufficient.

Justice STEPHENS. We will hear argument briefly on that.

If the motion to strike Paragraph 46(a) should be granted, of course, there would be no basis for any Bill of Particulars. However, you may proceed, Mr. Bromley, to argue the motion to strike Paragraph 46(a) of the complaint.

Argument by Mr. Bromley

Mr. Bromley. May it please Your Honors: Justice Stephens. Mr. Steffen.

Argument by Mr. Steffen

Mr. STEFFEN. Your Honors:

In opening for the Government in this case I would say we make no objection to the first two technical points discussed by Mr. Bromley. We are quite content to let the question go to issue as it has been argued by Mr. Bromley.

I would like, in discussing the question, to go back a little bit and take up some of the questions indicating the

type of issue that is presented here.

I want to show first that the pleadings in the case are an allegation on the part of the Government that the defendants have violated the Sherman Act, Sections 1, 2 and 3, in that they have conspired to restrain commerce in gypsum board and gypsum products, in interstate commerce.

We have detailed in the brief rather carefully what the charges are, and we have also detailed in the brief what some of the admissions are. But the admissions on the part of defense counsel in argument before this Court, and in their answers to the complaint, indicate that they agree that interstate commerce is involved, they agree that there has been price fixing, they agree that there has been some measure of standardization of product; and while they dispute that there has been any fixing of prices or resale

prices by manufacturing distributors, the evidence, I think, will bear out the point that they have been in substantial compliance with the prices fixed by

the United States Gypsum Company.

Now in the brief we cite the usual pronouncement of the United States Supreme Court in the Masonite case—that is on pages 3 and 4 of our brief—that where you have a

case of admitted price fixing, which is what we have in this case, that you have, per se, a violation of the Sherman Act. The language of Mr. Justice Douglas, at the top of page 4. is uncompromising on that point. So that what we take to have been established here is the point, first, that there is admitted violation of the Sherman Act excepting as the defendants are able by their pleading in Section 35 of the U. S. Gypsum answer, to set up the legality of their conduct under their patent license agreements.

Now it seems to us-and we set out, let me point out, Section 35 of the defendants answer, not in this brief but in the brief on the bill of particulars—it seems to us that the defendants by their pleading of the validity of their patent license agreements, and the validity of their patents. are making an argument in confession and avoidance.

They say, "True we have on the one hand violated the Sherman Act, but on the other what we have done is legitimate under our patent license agreements and", as they say, "under the decisions of the United States Supreme

Court."

Now there is only one decision of the U.S. Supreme Court that they can really rely upon, and that, I take it, is the General Electric case which we

also discuss in the brief.

I want to show that in order to bring themselves within the General Electric case, which is their affirmative defense, they must show, it seems to me, that they have valid article patents substantially covering, or covering, the product which they make. They must show secondly that their product is manufactured under those patents; and they must show thirdly that the various regulations appearing in their license agreements are reasonable.

In the General Electric case Chief Justice Taft assumed that the patents were valid. He assumed that they covered the product. Both of those matters are challenged by our 46(a). He went on and then discussed the reasonableness of the regulation and found in that particular case that it

was reasonable.

We have already said that we are contesting that in this respect, that the facts here are different. This is not a case where you have a single licensor and single licensee and an individual license arrangement. This is a case where all of the manufacturers of gypsum board in the territory east of the Rocky Mountains have combined, did combine in May, 1929, to regulate the sale and distribution of gypsum board in that territory.

That is a very different situation, we contend, that what was before the court in the General Electric case.

565 But that is a collateral matter.

Now in order to bring this matter into focus, as we told the Court back in March, we asked permission to amend our complaint to add Section 46(a). We contended there, or stated there, that the defendants had raised the issue of patent validity by their pleading in Paragraph 35. We contended, however, that in order to practically delimit what the Government might show we would designate five of the essential and principal patents, as we saw them, and

challenge their validity in particular respects.

We went into as much detail as we thought was required under the present Federal Rules of Civil Procedure, to state that they are invalid, and invalid in the respects mentioned, and I take it that what we did there was practically to limit ourselves to those five patents, because under the Rules of Civil Procedure, the defendants having pleaded that their patents are valid, we would be deemed to have denied that as to all of their patents. So that our pleading was in order to bring this matter into better focus and to get at the issues in question.

Now let's get down to the question that is presented here this morning. The broad question as I see it is—may the Government introduce evidence in an anti-trust proceeding to show that the patents which the defendants allege form

the basis of their defense are valid, or are invalid.

I take it that on the substantive matter the defend-

ants certainly make no contention, and can make no contention, that they are justified in a price-fixing arrangement based on invalid patents. What they say is that "if our patents are valid or invalid is none of your business, you can't inquire into it, and if they are invalid it is all the same to us, we are entitled to have a license agreement and a price-fixing arrangement until 1954 based on invalid patents, if we see fit".

Now maybe that states it too emotionally, but that is substantially the position which the defendants must sustain, that is, that they have no position as a substantive matter, but that it is a purely procedural matter; that the Government is estopped, in effect, to show the true state of facts as alleged in the complaint that the defendant's patents are

invalid.

Needless to say in an equity court it would seem that that is a pretty slender position to have to take, that they have no question but what if their patents are invalid that they ought to be allowed to fix prices. "But", they say, "the

Government may not show that fact."

And I might add that they have very carefully in their agreements in 1929 provided that they won't test the question. They have agreed, all of them, that they will not test the validity of any patents issued or to be issued under

the agreement. And as a consequence—well, strike that, I don't know whether it was as a consequence or not—but as a fact there has been no test since

1929 of the validity of any of these patents.

So that the net effect is that they stand fenced in behind what may or may not be invalid patents, and tell the Gov-

ernment, "You can't inquire into that matter".

Now they rest their argument largely, as I see it, on the American Bell Telephone Company case. I want to point out at once that I think the distinction between that case and this case that gets at the center of discussion, is this, that is a discussion as to whether the Government should be estopped in an anti-trust proceeding to show that the defendant's patents are invalid and not what they seem.

The American Bell Telephone Company case in 167 U.S. was itself the last of three cases. It was a long and elaborately worked out proceeding. The Government appears to have made the contention in those three cases that the defendant's patents were invalid and should be cancelled, and the grounds were substantially two in the third case:

(1) That there was something in the nature of fraud in that a period of 11 to 13 years had elapsed between the time of the application and the time that the patent

issued: and

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(2) As stated by Mr. Bromley, the patent was invalid for the reason that it had been anticipated by prior patents issued to the same inventor.

Therefore, there were two grounds: (1)—fraud;

(2)—anticipation.

Now I might say that the Court very clearly points out that upon the matter of fraud, if fraud can be shown, that the Government is privileged, and in fact it is the Government's duty, to bring an action to show that the patents are invalid because of fraud, and to have them cancelled. That is established, at least, definitely by the case.

As respects the matter of having them cancelled because there was a prior patent, or there may have been a prior patent, that is the issue of anticipation, the Court was equally positive that the Government might not interfere

and cancel.

Now our contention here is that that decision, so far stated, is absolutely correct. It seems to us that it says that the Government is in no sense entitled to step out of a clear sky and say,—"We think your patent is invalid because Mr. Jones had another patent which anticipated you". Well, the Attorney General hasn't any right, hasn't any power or any authority at all—

Justice BLAND. There is no remedy provided like that.

Mr. STEFFEN. No statute, no common law or anything, to step into a situation like that and say, "We think your patent is invalid and we are going to have it cancelled". Of course the Court told him quite vehemently and prop-

erly that he could not have it cancelled. That isn't in issue here; we are not asking to have any of these

patents cancelled.

The second point is more important. We are not proceeding out of a clear sky. We are now just saying, "We think your patents are bad". This is a direct attack brought by the United States Government to show that the defendants have violated the anti-trust laws, and I think it should be taken to be agreed that as a substantive matter if they have fixed prices on invalid patents, they have violated the law.

The question, the whole question, is therefore—is the Government in an authorized position to proceed to show the actual and true facts as to the invalidity, if that is the case?

In other words, we are moving under the Sherman Act, Section 4 of which provides that it shall be the duty of the Attorney General to bring proceedings before an equity court to restrain violations of the Sherman Act. It isn't a volunteer proceeding, it is simply a Congressional mandate requiring the Attorney General to bring proceedings to show that the patents are invalid, if that is the basis upon which the defendants have sought to restrain trade.

Now I think that accounts for the American Bell Telephone Company case. It seems to me that the court had before it simply those two questions, and it had that particular issue before it, simply whether the Government

could or could not cancel.

Let's point out what we are trying to do here, what the Government contends for in this case. We are contending that the defendants have restrained trade on the basis of invalid patents. We are not attempting to show that those patents should be cancelled, or that they

should be stricken out in any sense. We simply are contending that the fact of invalidity may be disclosed in a proceeding of this sort in order to get at the essential facts of whether or not the defendants are, as a substantive matter, violating the Sherman Act.

Justice BLAND. It hasn't been questioned here by any of the defendants, that even if the patents were valid but were insignificant in bringing about the result of which you complain, nevertheless they could be restrained—as I understand, that is not disputed. Now it is your position, I take it, that you can raise the question of invalidity as well as you can raise the question of insignificance?

Mr. STEFFEN. That is right, or the question of whether they have used the patents, or whether their regulations are reasonable, or any other fact.

Justice BLAND. Didn't we strike out the interrogatories with reference to the use of the patents, that is, in the answers now, Mr. Bromley—I don't remember?

Justice STEPHENS. I think I can answer that question. We didn't rule that that was irrelevant; we only ruled that the questions as phrased required too much detailed effort to describe the prices.

Mr. STEFFEN. May I read to the Court briefly the paragraph of the American Bell Telephone Company case which we think affirmatively says that the Government is privileged to show facts, as it is attempting to do here. That is on pages 264 and 265 of the opinion, and on page 12 of our brief. There the Court says:

"Suits may be maintained by the Government in its own courts to set aside one of its patents not only when it has a propriety and pecuniary interest in the result, but also when it is necessary in order to enable it to discharge its obligations to the public, and sometimes when the purpose and effect are simply to enforce the rights of an individual."

Then on farther down it says:

"But when it has no propriety or pecuniary result in the setting aside of the patent; is not seeking to discharge its obligations to the public; when it has brought the suit simply to help an individual; making itself, as it were, the instrument by which the right of that individual against the patentee can be established, then it becomes subject to the rules governing like suits between private litigants"—and then only.

Now-our contention here is that under Section 4 of the Sherman Act the public interest is very definitely stated.

The Attorney General is required to bring suits, if
the facts are such, to show that the defendants have
violated the Sherman Act; he is not acting as a volunteer, he is acting very positively along the lines laid
down for him by Congress, and the American Bell Telephone Company case very clearly recognizes that there is
such a possibility of the government moving in its sovereign capacity to eliminate invalid patents; it says so.

Now it doesn't go on and discuss it. The discussion it goes on to make is that where the issue, the basic issue, is simply between two inventors, one who holds a prior patent and one who holds a later patent, that the interference and

infringement procedure is entirely adequate.

That is very carefully stated by Mr. Justice Brewer, that the remedy at law is adequate. He then goes into Section 4920 and discloses in full what those remedies are, and says in effect that, inasmuch as the defendant who would be benefited by a suit brought by the Attorney General, for these reasons has a completely adequate remedy at law and has had since the patent laws were inaugurated, there is no occasion for the Attorney General to start a proceeding to help one individual at the expense of another.

Justice BLAND. Let me ask you—in that case that you are discussing they held that you didn't have any right to cancel a patent when you were doing it in the interest of some third person and not doing it under the public policy as a sovereign. Did they apply the doctrine of estoppel to the Government there?

Mr. Steffen. I don't recall whether they did or not.

Justice BLAND. Is it estoppel nevertheless?

Mr. Steffen. I would say not an estoppel; it was simply a complete showing of lack of authority on the part of the Attorney General to act.

Justice BLAND. Doesn't this follow, that the Government having issued the patent, and not being interested except where a third party is involved is estopped to intervene—or would that be estoppel?

Mr. Steffen. The two ideas are different ways of saying

much the same thing.

That portion of the brief, Your Honor, was directed to the proposition that it does not apply to the Government where it is acting in its sovereign capacity and acting in the public interest, and in this very quotation that I read to you the Court goes on to say that where the Government is moving to cancel a patent because of fraud, that the ordinary rules of estoppel do not apply.

Perhaps I should go on immediately now to the Sola Electric case which has been referred to. The Sola Electric case is our most recent decision by the U.S. Supreme Court, indicating the general attitude of the Court as respects matters of estoppel in anti-trust proceedings.

That was a suit brought by a licensor against an individual licensee for two matters; (1) to obtain back royalties; and (2), to require the defendant to abide by a general price-fixing scheme, very muh as if U.S.G. should sue National and require them to pay royalties.

.The defendant in that case, by a declaratory judgment, was permitted to raise the question in the Supreme Court of whether or not the plaintiff's patent were invalid, and the reasons which the Supreme Court attached for its position. are very persuasive in the present litigation. Note that it was not an infringement case. The defendants in their brief say that it was an infringement case, which of course is not the fact.

It was an action brought on contract; it didn't raise Section 4920 of the Patent Laws at all. Plaintiff is suing for a royalty. The defendant says, "I don't have to pay a royalty because your patents are invalid"-and he asks a declaration to the effect that the plaintiff's patents are invalid. It has nothing to do with infringement, it is simply a contract action.

It has nothing to do with the statute. There is no statutory provision which authorizes the defendants to put in a

case that the plaintiff's patents are invalid.

The lower court said that the patents should stand just as they read, that the patents could not be questioned. It stated most of the things that counsel 575 here have said, that patents are issued by the Government and there ought not to be any question as to their validity excepting in a proceeding set up by statute.

The Supreme Court, Mr. Justice Stone speaking, was very explicit upon the point that the matter of validity was wide open to a defendant who sought to show that he was not obligated to pay royalties under the patent because the patent was invalid, and hence the price-fixing arrangement was invalid under the Sherman Act.

That is exactly the issue we have here. The patent being invalid, Mr. Justice Stone said, the defendant may show that fact for the purposes of showing that there has been a violation of the Sherman Act, and that therefore he is

under no obligation to pay royalties.

Now the reasons that the Court assigns for that statement are that the public interest requires, not only as respects patents but as respects the fair administration of the anti-trust laws, that the fact of invalidity in a transaction of that sort should be shown. That is a very clear-cut pronouncement, as we contend, concerning the attitude of the Supreme Court on that point.

I might go back to our other authorities which are also in point, on whether the Government may or may not show

patent invalidity in a suit of this sort.

576 The Standard Oil case, the gasoline cracking case, which the defendant mentions, is also cited in our brief at some length.

Justice BLAND. Was that an anti-trust suit?

Mr. Steffen. That was a gasoline cracking patent suit, an anti-trust suit, brought by the Government for the purpose of showing that patent pooling was invalid, and among the allegations were allegations that the patents were in-

valid. It is discussed at page 14 of our brief.

I want to call your attention to the fact that when the matter was assigned by the three judge court to a master to take evidence, one of the first questions that the Master brought back to the Court was the question of whether it would be appropriate for the Government to introduce evidence to show that the patents were invalid, and also to show that they were limited in scope.

And the ruling of the court—this is a 3-judge court—is stated there on page 14 of the brief. No, that is the question.

The question asserted is:

"The main question is to get this fairly before the court for decision, in all its aspects—as to whether the Government has a right to attack either the validity or the scope of these Letters Patent and whether this attack is collateral or whether it is direct "".

Then on page 15 we quote what the Court ruled:

"The Master having certified questions to this Court respecting the admission of evidence, and this Court, having heard counsel and being fully advised, is of the opinion that the objections should be over-ruled and the evidence received".

Now that is the only ruling in that case on the exact question of whether that evidence should or should not be received. When the matter went back to the Master there were further proceedings and further argument, and a new petition as to two defendants presented, and the Master then came to the conclusion, referred to by Mr. Bromley, that in his opinion it wasn't appropriate to put in any evidence to show that the patent was invalid or that it was limited in scope, it must read just as it issued from the Patent Office.

The matter then came back to the District Court for

its opinion and the District Court then said: .

(1) That they were very clear that evidence should be admitted for purposes of showing the actual scope of the patent; and

(2) That in view of their decision it was not necessary for the Court to pass upon the question of whether or not

the Government could put in evidence of invalidity.

They said they were divided on the point, presumably they had been divided on the point when they made their first ruling, perhaps 2 to 1 in favor, maybe 2 to 1 against.

578 That, of course, is a very inconclusive ruling, but in so far as there is any ruling by the Court it is

favorable to the Government.

When the case went to the U. S. Supreme Court, Mr. Justice Brandeis, writing for the Court, said that the matter of patent validity not being presented, they wouldn't pass upon it, and that ended that case so far as it being

an authority here is concerned.

I want to refer, though, to the Porcelain Appliance case which is also cited by us as a definite authority for the right of the Government to bring an action of this sort and to show patent invalidity. That is United States v. Porcelain Appliance Corporation, on page 13 of the brief, decided in an unreported opinion by Judge Westenhaver. We have copies of the opinion here which we will furnish to the Court.

There the Judge stated:

"Obviously, this is not a suit by the United States to cancel patents. (Making the distinction which we made to start with). It is probably beyond the scope of all possible issues to decree certain patents or certain claims thereof to be void. (We, in our prayer, do not ask that these patents be cancelled). The issue here is whether or not the defendants have organized and are members of an illegal conspiracy and a final decree can probably not have any broader scope. These expressions are not to be taken

the final determination of any such question.

However, assuming they correctly state the law, it would still appear that the allegations of the bill are

proper and that the testimony in support thereof might be received. . . . I can perceive many combinations, in violation of the Sherman antitrust law, in which patents or claims thereof, invalid in view of prior art, or limited in nature, may be wrongfully used in building up or maintaining such an illegal conspiracy."

The Court then allowed the Government to proceed to show—I mean that was an allowance on the part of the Court to permit the Government to show—invalidity.

Mr. Bromley said the case never amounted to much because they settled it by a consent decree. Of course the consent decree was the judgment of the Court that they had violated the patents, and when it was shown that the plaintiff could show patent invalidity, there wasn't any further contest left, apparently.

. But it is an actual holding by a Court saying that the Government may introduce evidence to show the patent

invalidity in an antitrust proceeding.

Now we have, in the Supreme Court, a number of dicta which I want to call Your Honors' attention to because while they do not constitute a ruling by that Court they most clearly constitute a showing of the attitude of the Court upon this question, which has been much mooted through the years.

In the Ethyl case—this is on page 16 of the brief

580 —Mr. Justice Stone said:

"In considering that question we assume the validity of the patents, which is not questioned here".

In the Masonite Corporation case, which is also cited,

Mr. Justice Douglas said:

"We assume arguendo that the patents in question, owned by Masonite, are valid."

And in the case of United States & Univis Lens Company, cited on page 17, the Chief Justice went on to say:

"The Government has not put in issue the validity of the lens patents, but argues that their scope does not extend beyond the structure of the lens blanks and consequently affords no basis for the Corporation's restrictions on the sale of the finished lenses which the wholesalers and finishing retailers fashion from blanks purchased from the Lens Company.

"The record gives no account of the prior art and does not provide us with other material to which, if available, resort might appropriately be had in determining the nature of an alleged invention and the validity and scope of

the patent claims founded upon it.'

Now our contention is that in these prior cases when Mr. Justice Brandeis, Mr. Justice Douglas and others have said, "We assume arguendo that the patents " are valid", or that " we assume the validity of the pat-

ents, which is not questioned here", that had they had the defendants' contention in view they would have said, "which cannot be questioned here", "that validity may not be questioned in the case", and when we consider Mr. Chief Justice Stone's writing in the Univis case it is very clear to us that the U.S. Supreme Court has practically invited a showing of evidence as to the validity or invalidity of the patents involved in a proceeding of this character.

In the Sola Electric case the Court stated that the public interest required that the Patent Laws and the Sherman Act be fully and completely enforced, and they allowed an individual, in the Sola case to show patent invalidity, apart from any statutory authorization whatever, in order that he might show a violation, that he individually might show

a violation, of the Sherman Act.

Now our contention is that if those reasons obtain in a private litigation, that is, the public interest in seeing that the Sherman Act is fully enforced, they would obtain all the more clearly in a case where the Attorney General is moving pursuant to the authority of Section 4 of the Sherman Act to bring the questions in an orderly fashion before the Court for a hearing as to the actual facts as to whether their patents are valid or invalid, and therefore whether their price-fixing structure is right or wrong.

We have divided our argument up in the brief into four general points. The first point I have discussed, which concerns the fact that the Government is

moving in this proceeding in its sovereign capacity. The second point, mentioned on page 9, makes the argument that this proceeding is a proceeding merely to show the fact of invalidity, and does not constitute an effort to cancel the patent or to in any way interfere with the patent, that the defendants may continue to hold their patents, for what they may be worth.

Third, we say that patents have never been more than prima facie in effect, and I think that if you will look at the history of patents from the day they were first issued back in the 1790's, when they were issued largely as a purely ministerial thing by the Secretary of State and anybody could come in and apply and say, "I have satisfied the statute," and they would issue him a patent, to the present day, that they have never been final and conclusive upon the matters listed in Section 46(a). There isn't any authority at all to support the defendants' contention in their

points and authorities that patents are final and conclusive determinations of the Patent Office, they have always been regarded as merely prima facie.

Perhaps the best authority—Your Honors are undoubtedly familiar with the Reckendorfer case, and Dunbar and Myers, and that whole line of cases, where the Court very

clearly has said that the determinations of the Patent

Office as between a patent holder and infringer, are wide open, they are merely prima facie determinations by the Patent Office, which are entitled to a certain dignity, having been issued by the Government, but on the other hand are not final and conclusive, and a moment's thought, I think, would show that this case is very different from either the land cases or the certificate of naturalization cases in that respect.

A patent is authorized only pursuant to the statute. The Commissioner has no power actually to issue a patent, according to the Reckendorfer case, unless certain requisites have been fulfilled. Those are that he has an invention, that it hasn't been anticipated by somebody else, that there has been no publication, no prior use, that he has stated his terms concisely and clearly—and other matters that are

stated in the Act.

Upon that the Patent Office asks the inventor to present an oath. The inventor says, "I have invented something, it is new, it is useful, it hasn't been published within two

years.'

The Patent Office has never been equipped to go out and find out whether or not Mr. Jones, in California, or Mr. Smith in Florida may not have used a device of the sort claimed in the patent. It is impossible, as a matter of fact, to have a patent which has been completely searched as respects all matters of anticipation. And as a con-

sequence the Patent Office says, "Well, Mr. Roos (in this case) you have told us that your patent is valid, you have told us that there are no prior publications, you have told us that it is an invention; we have looked over certain matters and we think it is entitled to a least a prima facie position".

That is all we say, that is all we have ever said. And it is open, then, under Section 4920 or under the other statutes for anybody to test the validity and we are contending here that the Government may show whether it is valid or invalid, as a matter of fact, in a proceeding of this

sort. .

Justice Garrett. I would like to ask one question here. You have drawn some distinction here. I suppose you in-

tend us to regard it as a distinction—between the Bell Telephone case, the fact that there they sought to cancel and here you are not seeking that but are simply seeking to have it declared invalid. What is the difference, in effect?

Mr. STEFFEN. We don't ask to have it declared invalid. We just wish to show the fact that it is invalid. It would not have any bearing as a determination, it is just a showing that in this particular case the facts are that the patent is invalid and that therefore the defendants have violated the Sherman Act.

Justice Garrett. Well, if we agree with you we would have to hold it invalid, wouldn't we? There would have to be a judgment of the Court that it was invalid, wouldn't there, in order for you to benefit by your contention?

Mr. STEFFEN. No; all that you would actually have to do would be to say that the defendants have violated the Sherman Act, and they have violated it in that their affirmative defense of a valid patent monopoly isn't supported by the facts.

Perhaps I can make my point clearer, Judge Garrett, by referring you to the case of Pratt v. Paris Gas Light &

Coke Company, on page 20 of the brief.

That, stripped to its essential facts, was a case where the plaintiff had agreed to construct a gas works for the defendant pursuant to a particular patent. The patent turned out to be invalid and the defendant refused to pay the consideration for his contract. Now in that case the Court said on the fact of invalidity, whether the patent was or wasn't invalid, that it was open to the defendant to show that the patent was invalid and that he could do that apart from any statute whatever. It was not a declaration of the court which would set aside the patent or cancel the patent, it was simply the finding of an incidental fact which was necessary in order that you wouldn't do injustice by forcing a contract party to pay a consideration where the consideration had essentially failed.

Justice STEPHENS. But we would have to make a judicial determination, would we not? The defense to price-586 fixing here is that price-fixing is proper under the General Electric case because it is price-fixing which occurs under patent license agreements. You assert that the patent license agreements are not valid for two reasons; first, because they go beyond the corporate confines of the

General Electric case decision; and second, because of the patents on which they are founded being invalid. It seems to me that that goes to the very gist of the contentions. Have we got to reach a judicial determination that these patents are invalid, and if we do what is the difference between that and cancelling them, except in the form of the ruling?

Mr. STEFFEN. I would say that you are quite right, that you would have to make a judicial determination. The difference is one in remedy. We don't ask to have it cancelled. Our only authority, as I see it here, is to enforce the Sherman Act, and that is all that we ask, that such remedies be granted as are necessary to make sure that the central policy of the Sherman Act is fully carried out. And if, in the course of that, it is necessary to say that patent number so and so is invalid, and therefore their price-fixing scheme is invalid based on that, that would be a judicial determination, but we do not ask to have the patent cancelled.

I might point out, Judge Garrett, that the other ground is that we are not proceeding on any question of fraud, which was granted in the American Bell Telephone case as being a proper means of proceeding.

Justice Garrett. Yes, I understand that. The particular thing I was inquiring about is that I was curious to see if there was a judicial determination and that the patent was invalid, what is the difference between that and an order to cancel it. It has the same effect, doesn't it? That throws that process open to the public and destroys the value of the patent as far as its owner is concerned?

Mr. Steffen. I should think so, and let me point out that we have asked the Court in this case, on the authority of the Morton Salt Company decision, to go so far as to enjoin the defendants from enforcing any of their fifty patents because of their violation, or alleged violation, of the Sherman Act.

So that whether we ask to have the patent cancelled, or don't, becomes more or less of an academic question, because if we take that position that the patents are unenforcible anyway because of a violation of the Sherman Act, then the collateral matter of whether they are actually void is of course more or less of an incidental matter.

Justice GARRETT. Now just a question on the issue with respect to these patents in view of the fact or of your statement that you are asking that they be enjoined from

enforcing all fifty or whatever the number is—from proceeding under any of the fifty. I thought you were just attacking five here?

588 Mr. STEFFEN. That is right.

Justice GARRETT. What are we going to do about the other 45, are we supposed to do anything about those?

Mr. Steffen. Let me point out this, that if the Court finds that there has been a violation by the defendants of the Sherman Act, under the doctrine announced by the Supreme Court in the Morton Salt case a year ago, they cannot come into an equity court thereafter and ask to have those patents, the patents which contributed to their violation of the Sherman Act, enforced; that their hands are dirty, in the language of the law, and until such time as the evils of the monopoly have been dissipated, that they are without power to sue for an infringement of those patents and should be enjoined, and we have asked the Court to do that as respects all of them.

Now that is a matter quite apart from the validity or invalidity of these five. If we simply show, by whatever means, that they have violated the Sherman Act and have used their patents in some measure toward that end, then we may ask the Court to have those patents, not cancelled, but ask to have the defendants enjoined from using or enforcing them, before an equity court, and that is cold law, as I understand it, by the U. S. Supreme Court in the

Morton Salt case, cited here in our brief.

Justice STEPHENS. I suppose you are also making this distinction with respect to the five patents and the forty-five. As to the five, you have got two legs under your stool so far as your case is concerned, you say in the first place that the license agreements went beyond the proper scope of the patents, and secondly, that the patents were invalid. As to the other 45, you say only the first.

Mr. Steffen. That is right.

I call Your Honors' attention to the case of United States v. Bradford, cited on page 22, which is a criminal case and raises this matter of collateral attack. The United States there brought an action charging that the defendants had conspired to defraud the United States by obtaining the issuance of land-script, and the means by which they had done it, it was charged, was by having an administrator appointed in a state court. It was argued before the court

that inasmuch as the administrator had been duly appointed, that it wasn't open to the United States, in enforcing its criminal statutes, to show that the administrator

had been improperly appointed.

The Court quickly disposed of that with the holding that the United States, in enforcing a criminal statute, would not be prevented or estopped from showing the actual fact that the appointment of this administrator was part of the general scheme and done for the purpose of aiding them in defrauding the federal government.

Of course the case is not on all fours, but it is an indication of the sort of thing which we are contending

for here.

Now I want to make my final point, which is that regardless of how the Court might wish to decide this question in an ordinary antitrust case, that in the present case the defendants have estopped themselves entirely from setting up any question of government estoppel to show that the patent is not good.

The defendants have all gotten together, did in May of 1929, and have signed an agreement that they wouldn't contest the validity of these patents, that they wouldn't contest the validity of the patents issued or to be issued

on applications then known.

Now the Supreme Court has been fairly clear in stating that that goes a long way, and that the policy underlying it is not to be favored. I cite you the opinion in the Gormully case on page 36 of the brief, in which the court says:

"It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his

monopoly".

Then it goes on to discuss whether a patent holder or licensee who had agreed never to contest the validity of the patent-holder's patents, even after the license had elapsed, whether that would be a proper policy, and their indication is definitely that it would be a bad policy.

But the defendants here have gone much farther, they have agreed not to contest the validity of any of these patents, and as a fact since 1929 there has been no contest of the validity of any of the five patents that we are questioning. In fact, so far as I know there has been no question as to the validity of any of the fifty patents.

Justice Bland. Let me see if I understand that. You say that these folks having agreed not to contest the valid-

ity, that then we have a case of estoppel against estoppel. That is, they are estopped from raising the question of estoppel on the part of the Government?

Mr. STEFFEN. That is correct.

Justice BLAND. What are the authorities on the question of double estoppel?

Mr. Steffen. We cite, on page 34, the case of Commonwealth v. Brierly, which is one case which came fairly close, as we saw it. In that case Pennsylvania had apparently issued a grant for land. Later on Brierly applied for a patent to the same land and in his application or oath, which compares with the application or oath of an inventor, he said that the land was vacant, that is, that it had not been previously covered by a patent. Thereafter it developed that there was timber on the land and the Commonwealth of Pennsylvania bought up the land from the holder of the original grant, and then started this suit for trespass against Brierly who had bought by the subsequent grant.

The Court quite clearly said that where the defendant in the case, Brierly, had stated to the government that the land was vacant, that he would be in no position to estop the government from attacking the validity

of that warrant or deed.

And I want to call your attention also to the point that they do not put it on the basis of fraud. They said:

"Under such circumstances we cannot see how Strouse could have successfully invoked the aid of the doctrine of equitable estoppel (and that is all we are concerned with here, equitable estoppel by deed, deed of patent) to ward off the consequences that necessarily flowed from his own mistaken or false representation that the land applied for was vacant land."

And in this case it is our contention that the defendants are equally estopped by virtue of their self-restrictive clauses, and having prevented any test in the ordinary way by an interference proceeding, as well as by their assertions that is that they do have an invention, that there is no prior art, and that therefore their patents are good.

Justice BLAND. For them to be estopped from raising estoppel on the part of the Government, they must have done something or said something contrary to the position they are now taking?

Mr. Steffen. Not necessarily contrary, but contrary to fact.

Justice BLAND. They haven't admitted anywhere that these patents are invalid; they have merely said, "You shall not contest them".

Mr. STEFFEN. That is right.

Justice BLAND. I can't apply that-

Mr. Steffen (interposing). Let me make it as clear as I can. In the Brierly case, if this analogy is to hold, the Government is proceeding by way of trespass to test the title to the land which it has purchased from a prior grantor, under a prior grant. Now let me point out that the Government is proceeding in a proprietary interest, and in the American Bell Telephone Company case it is recognized that you may proceed in your sovereign capacity or for your proprietary interest, and in that case the Government would be properly proceeding for the protection of its interest.

It had bought land and it wanted to know whether it owned the land or not. In the course of that the defendant said, "You are estopped because you issued me a deed". The Government said, "You are estopped because you told us that the deed was upon vacant land when in fact it was upon land which had already been granted."

Justice BLAND. I don't quite see the analogy of that to the facts involved. In other words, his saying that this was unoccupied land it seems to me is not equivalent to some one saying, mind you, not saying a word about

whether the patents are valid or invalid, but saying that you shall not contest their validity. I don't get the analogy.

Mr. STEFFEN. Well, in both cases it is the government, and in both cases we have a deed, and the ordinary estoppel by deed would apply. That is, I take it, that the citation of Mr. Bromley and the defendants on the land cases where the Government has issued a deed to land, that it cannot come in in another proceeding and later on say, "We didn't mean it".

The land cases are quite distinct from the patent cases, and are clear. The doctrine of estoppel by deed is largely based on the land cases. So in the Brierly case we took the strongest situation. The Government had issued a title for land and it later acquires the title from the prior.

grantor and sues in trespass. Now its authority to bring that suit is because of its proprietary interest, it is the

owner of the land.

We contend that the authority of the Government to sue here is in order to protect the public generally from monopolies, that we are likewise proceeding under an authorized statutory authority, and that when we are met with the statement, "Oh yes, but you issued the patent, therefore you should not be allowed to go behind that patent and show that a price-fixing structure based on that patent is bad", to that we say, "We issued the patent but we issued it in

reliance upon your statement and oath" not that the land was vacant, but that there were no prior patents of the same sort, that the prior art discloses—

Justice BLAND (interposing). Then you are not relying upon the agreement not to contest; you are relying upon the oath of the patent holder that it was valid?

Mr. Steffen. In this case. But I haven't made my argu-

ment clear, I take it.

There are two branches, Your Honor, and the first branch of the argument is just as you are quite properly pointing out, that so far as we have gone with the Brierly case it rests entirely upon the matter of oath and assertions made by the defendants to the Patent Office, and we say that inasmuch as the Patent Office issued it in reliance on those assertions, that the Government may not be estopped to test the validity of those assertions where the Government is proceeding, as in this case, under the authority of a Congressional statute.

Now I went on from that. What I wanted to do was to go on to the second point. A double reason why these defendants should not be permitted to estop the Government from testing the validity of their patents. And that is that not only did they make oath to the Government, not only did they present affidavits—in this case they presented an affidavit in connection with the Roos patent, saying that 3 billion board feet had been manufactured under this patent in the ten year period preceding the time when

it came up before the court on the interference proceeding, a proceeding before the time it was even ruled upon by the Patent Office—but they did not show that during that time there was an agreement between these defendants to use these particular patents. Therefore, the disclosure to the Patent Office was much smaller perhaps, and not as complete, as can be developed in a case of this sort where all those facts can be brought out. But that argument goes so far as to bring it, I hope,

within the analogy of the Brierly case.

Then we go on from that and say that the defendants have estopped themselves further by agreeing not to permit an ordinary contest of the validity of the patent by infringement suit, that is, they have taken all of the people who are in the business and have tied their hands and have said, or they have said, "We won't contest the validity".

It is perfectly possible that Mr. X could start a plant and infringe, but as a matter of practical business sense, no one is going to put in, no one has put in, the million or more dollars necessary to start a plant and to make an actual infringement suit which would test the validity of

these patents.

And we say that in a court of equity, where the defendants are asking you to tie the hands of the Government, that it is encumbent upon the defendants themselves to show complete and fair dealing on their part. We do not

see that, in the light of those agreements not to contest the validity, that they have fairly permitted the

ordinary processes to operate.

If you read carefully the American Bell Telephone decision I think you will find that the Court there clearly had in mind that the remedy at law was adequate for the reason that under Section 4920 anybody could have started an interference proceeding or infringement proceeding,

and have thereby tested the validity.

Where the defendants step in and stop the normal way of testing the validity of a patent, even though they do it only nine-tenths, it seems to me that they are in a bad light to come here and say that the Government shouldn't be permitted to test the facts, and to say, "It is true that our patents may be invalid and we won't let anybody test their validity in the usual way——

Justice BLAND (interposing). I take it that you think if the doctrine of estoppel against estoppel applies at all it is on the basis that they are asking something in equity with unclean hands. Now is it unclean for anyone else not to contest the validity of his patent if he takes a lease on it?

Mr. Steffen. I don't think so, not in a simple case of that sort.

May I state this just again very briefly. We make the first contention here that by virtue of their oath and their application the defendants have said that the patents are valid in the respects challenged by \$46.(a)—

Justice Bland (interposing). If they had said something that said they were invalid, then they would be estopped from afterwards asserting their validity.

Mr. Steffen. No, they give the reasons why the Patent Office ought to act. The Patent Office says, "Mr. Roos, you, having done all that, we will issue the patent to you in reliance on your assertion that there is no prior act in that case." Then the Patent Office having issued the patent in reliance on his affidavit and oath, they turn around and say to the Government, "Now you, having relied on our statement once, are estopped to show the actual facts" even though it is necessary in the interest of carrying out the policy of the Sherman Act to have price restrictions based only on valid patents and not on invalid patents. We say that that is a species of estoppel. Next the argument goes on and says that where you have prevented a test, that that makes the estoppel double-dyed.

Justice STEPHENS. Mr. Steffen, I think in view of the numerous questions you have been interrupted with, that your time has not been quite exhausted, but we will have to adjourn now because one of the members of the Court has an engagement at 12:30. And we will resume at quarter of two.

(Whereupon, at 12:20 o'clock, p.m., the hearing was adjourned until 1:45 o'clock, p.m., of the same day).

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## AFTERNOON SESSION

(The proceedings were resumed at 1:45 o'clock p.m., at the expiration of the recess.)

Justice STEPHENS. Proceed, Mr. Steffen.

Mr. STEFFEN. I have only one or two comments to make

and then I will close, Your Honor.

I want to refer to the Lucas bill, Senate Resolution 2730, which Mr. Bromley referred to, and point out that section 4 covers not only an action brought by the Government but by any party to a proceeding charging a violation of the Act of July 2, 1890, and it goes on to say that, in any such proceeding, "the opposing party or parties shall be entitled to show the invalidity or the limited scope of the patent or patent rights set up by way of defense."

That section of the statute is probably already unnecessary in the case of any private party. The decision of the Supreme Court in the Sola Electric case has covered that point completely, and only since this statute was drafted, saying that an individual party to a proceeding involving

the Sherman Act may set up the invalidity of the patents asserted by the opposite party. We do not find that there is any concession on the part of the Government that the Government may not, except for statute, do the same thing.

The statute was apparently designed largely to clarify the situation in the absence of a cold decision on the point. The Supreme Court has now given a cold

decision as respects a private party.

I want to refer to one other section of the bill in the same respect. Paragraph 1 provides that where there is a proceeding between two individual parties involving the validity of patents and involving a matter coming under the Sherman Act, that the Government may intervene. That would be to allow the Government to intervene and to establish the invalidity of the patents because of the general public interest involved in showing that there was a violation of the Sherman Act. The two individual parties might not be concerned, but it does involve a public interest which the Government would be interested in, and the reason I refer to that is that it also is probably no longer necessary. Within the last few days in Boston the District Court there, in a proceeding between two individuals, has had an intervention proceeding presented by the Government. The Government, in its intervention proceeding, has alleged that the patents are invalid and void.

Justice STEPHENS. You are referring to the Wyzauski decision?

Mr. Steffen. That is correct. In that decision, he allowed the Government to intervene and set up the invalidity of the patents.

It is true that the proceedings, of course, are only in the opening stages, but the opinion, as announced by Judge Wyzauski, would indicate that a motion to strike the Government's intervention proceedings upon the ground urged by the defendants here would not get very far. That is, he says, a matter which ought to be brought up before a District Court and completely heard, and he says it for reasons which I think may be very persuasive to Your Honors. We have submitted to you, or presented, a copy of Judge Wyzauski's opinion.

I have only one other point to make and that is on this matter of congressional intent with respect to the Act of 1910 which permitted the Government, when sued as an intervener, to set up not only the defenses called for under section 4920 but any defenses which any party, by virtue

of section 4920, or otherwise, might be able to set up. In that case, it is obvious that the Government, being sued as an intervener, is interested in its proprietary right, that is, it would have to take money out of its pocket if sued for infringement and under the doctrine of the American Bell Telephone case, that was one case where the Government would be entitled to show—

Justice BLAND (interposing). In this situation, you contend the same thing maintains with respect to this bill here.

Mr. STEFFEN. I searched the Congressional Record to find the answer to your question, and you will find throughout the discussion before Congress that the main debate or the main fight was whether Congress would be the best organ to pass upon these questions of claims because of possible infringement or whether they should set up a Court of Claims or some other tribunal which would hear them. The whole debate turned on that point. In the common law, the Government could infringe and not be subject to suit and it only could be held liable for losses where there was an implied contract to pay a royalty. That struck everyone as being unjust and, accordingly, many bills were presented to Congress and Congress, after much debate back and forth, determined it might pass a statute to aid a particular claimant, and the debate in Congress in 1910 was whether that procedure should continue or whether it should be taken out of the hands of Congress and put in the hands of a special tribunal. Throughout the debate in Congress, I think you will find there is no suggestion that the Government should not be permitted, because it is the Government, to introduce evidence of invalidity. In fact, that is taken as a casual matter that the Government should, and I ran across one quotation which I thought might be particularly persuasive with this Court.

Mr. Lenroot, who had a very definite part in getting that statute passed, had this to say, and I quote from page

27 of our brief. Mr. Lenroot said:

"Mr. Chairman, it is not, as I have said two or three times on the floor during this debate—it is not competent, in my opinion, for Congress to settle these questions of compensation for torts to patentees. In the first place, the first questions in nine cases out of ten of this character is, Has the inventor a valid patent? The patent granted in the first instance gives the inventor only

a prima facie right. Anyone can go into court and test the validity of a patent because of a prior patent covering the same subject, or for many other reasons. That is the first question and a most serious question. Then, if that be decided in favor of the inventor, comes the question of damages, and in every case the damages are unliquidated. These are not easy of ascertainment. I submit that the Committee on Claims is not competent, with the limited time at its disposal, to dispose of and decide these questions, the validity of the patents and the amount of damages which should be awarded."

I say that that is typical of the debate before Congress. It was purely a question of whether Congress or the Court of Claims should pass upon the question, and there was no suggestion made in the debate that I could find to the effect that the Government should, in any sense, be given or be denied a right to test the validity of the patents. In fact, the whole debate goes the other way, that patents

are admittedly only prima facie patents.

Justice Garrett. Mr. Steffen, I would like to ask you one question which goes back to a matter that was under discussion just before the recess was taken, with respect to these licensees binding themselves by contract not to contest the validity of these patents. I have never had any occasion, so far as I can remember, to look at a contract made under conditions of this sort where the owner of a patent is given a license.

Doubtless you have.

Is there anything unusual about a licensee binding itself? Of course, generally speaking, I understand the courts have held that a licensee cannot generally contest the validity of the patent when he has accepted a license under it. The Sola Electric case appears to make an exception under peculiar conditions of that case but is there anything unusual in this contest about one not binding himself not to contest and is there any element pertinent to this case involved in the fact that the licensees did so bind themselves?

Mr. STEFFEN. I think so, Your Honor. I would say first that Your Honor is quite right, that it is very usual for a single licensee to put in a phrase to the effect that the licensee will not contest the validity of the patent. That is simply an individual and ordinary arrangement. The Sola Electric case said that, in spite of the usual estoppel obtaining in that case, if the defendant alleged a violation.

of the Sherman Act growing out of the misuse of patents, that the validity of the patent could then be shown.

That is in an individual case.

The unusual things in this case are two-fold; one, that the defendants here are all of the manufacturers of gypsum board in the bulk of the United States, and we contend—we have no authorities on the point nor are there any against it—we contend that where all of the persons involved in manufacture agree among themselves that they won't contest the validity of the patents, that what they have done is prevented the normal and usual way of testing patents and that it ought to be looked at by a court of equity and looked at with very great concern that what it operates as being is a prevention of the usual way of keeping the patent stream clean from invalid patents.

Justice BLAND. Do your readings disclose the fact that any of these five patents were owned by any of the defendants prior to their transfer to the Gypsum people?

Mr. Steffen. I think all five patents were issued to the United States Gypsum Company direct, all five of them.

Justice BLAND. Were the applications filed by any of the defendants other than the Gypsum people?

Mr. STEFFEN. No, not on these five.

The second point that I mentioned, Judge Garrett, is that the defendants here have gone beyond anything ever seen in an individual patent arrangement where they agree

in advance to the validity of patents which may or may not be issued at some future date on applications then pending.

Justice GARRETT. I have been thinking about that.

Mr. Steffen. There is no authority at all that I know of for that. I would like to call your attention to the American Equipment Company v. Tuthill case in the brief, which says that where the parties have agreed to use a patent for purposes of controlling the price on an unpatented article and have really come together on the basis of the patent not because the patent was useful but because it afforded a means of getting together on prices, that when you look at these clauses in the light of those allegations to that effect, it makes them all the more reprehensible, in our opinion. That is, we allege that the defendants have taken the patents not because they were

particularly valuable but because they afforded a means of getting together on prices. In the case of the Utzman patent, which we are not challenging as that is long since gone, they did not get to use it, but they agreed to fix prices and did fix prices right away. That seems to us an obvious attempt to simply use a patent because it happened to be handy and allowed them to fix prices.

Their main purpose, we have contended, is to fix prices, and the patents are incidental. If you look, therefore, at these clauses, they would not permit these patents to be contested in the normal way among all of the defendants by

an infringement suit or otherwise, and if they, in fact, have not been tested during all of these years, it makes it look as though they are very questionable clauses, and when the defendants assert, as they do, that the Government should be estopped from testing the validity of the patents, we point out the fact that the developments of their part have prevented any ordinary test of their validity and that, therefore, for that reason we say, they should likewise be estopped and, therefore, the matter is "at large" as Lord Cope once said.

Justice GARRETT. In the matter of binding themselves not to contest the validity of any patent that might be granted on applications then pending, did it say "or thereafter pending"?

Mr. STEFFEN. Then pending, I think.

Justice GARRETT. Were they named, named by number?

Mr. Steffen. It refers, as far as this case is concerned, to the three Roos patents, the validity of which we are challenging. They were issued in 1935 and 1937, and this agreement was in 1929. The defendants did not know what form those patents were going to take when they finally issued, or much about them, nor do we contend did they care.

Justice STEPHENS. I would like to ask one or two questions. One of the first points you made was that the defendants themselves raised the question of validity by relying upon these patents. It seems to me, and if I am mistaken

I would like to hear to the contrary, it seems to me that that in a way is just a form of words which begs the question in the case, which is whether or not any question of validity can be raised in the case by the Government through the defendants, in relying upon

the patents, relying upon the validity of the patents. They do not assert them to be invalid, of course. They rely upon them as if they are valid patents, but can they be put in the position, because they plead that those patents are the subject of their license agreements, of having estopped themselves from contending the Government has not any affirmative right to contest the validity of the patents?

Mr. Steffen. I do not wish to make the contention that, because they have pleaded their patents are valid and their license agreements are valid, that, therefore, they are stopped.

Justice STEPHENS. I have not had the benefit of reading your final brief. I only received it this morning, and maybe the answer to the doubt that presently exists in my mind is in your brief. I have read the brief submitted by the other side and made some examination of the cases, but I wanted to state to you, so you can have the opportunity to answer or help me with it, what seemed to me to be the most serious difficulty that the Government has to meet in approaching this aspect of the case.

It seems to me that, so far as the estoppel case is 609 concerned, that they do not help the Government very much because estoppel is a machinery which prevents the exercise of a right which otherwise would exist, so that the estoppel argument does not get us far. It seems to me you might lay aside entirely the Bell Telephone case upon which the defendants rely, and assume, for the sake of argument, that it is distinguishable—

Mr. Steffen (interposing). That it is not distinguishable?

Justice Stephens. Assume, for the sake of argument, that it is distinguishable as you contend and lay it out of the case as a bulwark for the defendants. It still seems to me that the Government has failed to demonstrate thus far in its argument an affirmative basis upon which to rest the right of the Government to assail the validity of these patents, and it does not seem to me that it can be established merely by saying that this is an equity case and the matter is procedural only. Procedural rights have as great dignity in the law as substantive rights and it is true we are arguing here with a procedural question because substantive questions go to the validity of the patents, as such, and the right of the Government to protect them.

The doubt I have about your proposition and the contention you make is whether you have been able to establish

for us thus far anything in the case except, in the casual remarks in the Standard Oil case and in the Porcelain case, of the District Judge, anything in the cases which affirmatively indicates that the courts have recognized thus far in the development of the law a right on the part of the Government in an antitrust case or otherwise to attack the validity of a patent which has been issued by the Patent Office. You have offered no statutory basis for that. In short, it seems to me what the Government is really asking the Court to do is to make law, to develop a procedural right on the part of the Government which has not heretofore existed. I realize there there is a proper field for the growth of law through judicial adaptation of principles to broader lines on new cases, but it seems to me, in this situation where you ask the Court to recognize the right of the Government to strike down the validity of patents upon which—or so it is asserted the industry has, in part, been built or these license agrecments have been asked under, is, in effect, asking us to do something which the legislature ought to do because it is a very radical departure from procedural rights thus far established and it has a retroactive effect which statutes do not.

I suppose an argument could be made, and I understand, in some patent systems of other countries there is a declaratory action made available in the courts or an annulment action in the courts, so, upon the issuance a patent,

11 a judicial proceeding can be at once had to deter-

mine finally its validity.

It may be there are excellent arguments in favor of some such legislative remedy, but have we, sitting as trial judges, any right to make such a decision? And continuing with the argument you made with respect to grants of land to homesteaders or mining claims, and the homesteader proceeds to use the land for 10 years and then, according to the Government, continues to use it illegally; with respect to mining, or if it is a farm, Government regulations with respect to health of his animals, for example, the Government commences an action to restrain illegal use of the mine or of the farm, and in that action assumes at that time retroactively to strike down the patent. That is the big doubt that I have in my mind about the Government's position and it seems to me the lack of an affirmative foundation, either in the cases or in the statute, would be, in effect, a

request of this Court as a trial court to erect a new remedy. I have some doubts whether we have the right or the power to do that.

I state those things fully because I want you to have an opportunity to answer if I have a mistaken point of

view about your argument.

Mr. Steffen. May I spend five minutes in answer to that?

Justice STEPHENS. Yes, indeed.

Mr. Steffen. On the square authority, if that is what Your Honor is seeking, in part, in the cases we have cited to you only the Porcelain case as being squarely in point. We have cited the Standard Oil case where the Court itself decided, apparently upon a prior ruling, that the Government might put in evidence in a case very similar to this. That is the opinion of the Master, or report of the Master, which, of course, has no standing at all other than it is the opinion of a competent man. We have cited, in addition to that, the recent case by Judge Wyzauski which very definitely foreshadows a ruling that the Government may intervene and show invalidity of patents, and he has given reasons which are, I think, rather persuasive in that case.

The defendants, on their part, have shown no authority to the contrary. They have shown only the American Bell Telephone case which I agree with you to lay aside for the moment. I construe that to be in support of the Government's action here. Therefore, on the basis court decision, we haven't anything by way of decision which is cold.

When you move to the Univis case, the Supreme Court very definitely said within the year that it would be appropriate for the Government to introduce evidence in an anti-

trust suit to show invalidity and lack of scope.

Justice STEPHENS. Which case is that?

Mr. Steffen. That is the Univis case. When the United States Supreme Court goes out as positively and as lately as that—

Justice GARRETT (interposing). That is on page 17, isn't it?

Mr. STEFFEN. Yes, on page 17, and that is in 1942.

"The Government has not put in issue the validity of the patents." That is a case where we did not allege invalidity. "The record gives no account of the prior art and does not provide us with other material to which, if available, resort might appropriately be had in determining the nature of an alleged invention and the validity and scope

of the patent claims founded upon it."

That is not just an isolated dictum. It is a statement very clearly by a judge who has made several other statements of that same character within the last two or three years indicating that, when the time comes, the Supreme Court will sustain a showing of invalidity in an antitrust suit, and the reasons why the Court in the Sola case allowed the individual to show the invalidity in spite of local rules of estoppel, the reasons were, that by so doing it would contribute to the public interest not only in respect to eliminating invalid patents but enforcing antitrust laws. If those reasons obtain in a private suit, they obtain doubly in a suit brought directly by the Government to enforce the Sherman Act.

We are not here to declare the patents invalid.

We are here on the statutory thought, very definitely stating that the Attorney General shall bring actions before equity courts to remove restraints upon trade, and if we find a restraint upon trade hiding behind an invalid patent, the public interest in removing it, I should

think, would be pretty clear.

On the matter of your land grant cases, I am not an expert on land grant cases or land cases, but my understanding is that in those cases the Court has been very definite in saying, contrary to what they said in the Univis case, that where a grant of land has been made by the United States, it is going to have to stand back of it. The Government has had every opportunity ordinarily to determine whether they should issue the patent under one statute or another, to refer to the Price case which the defendants urge, and if it is a homestead matter, they have an opportunity, before they ever issue the patent, to have applicant prove to their satisfaction that he did reside on the premises the required time; that he did do the necessary improvements, and they are equipped to go out and make those determinations.

As I said this morning, in your patents for inventions nobody can contend that the Patent Office or anyone else would be able to say that Mr. Jones out in California did not make a prior invention. Nobody knows, and, therefore,

what the Patent Office does is to say, "We will give you the dignity of a grant which we think, prima facle, is valid. We are relying on your oath on your application to sustain the validity," but we contend that

there is no further estoppel, and if, in a proper procedure brought under proper statutory authority, that becomes an incidental fact, we contend that it is open to the Government to show the fact. As I say, all the authorities that have had the point up have gone our way. They are not strong authorities, but there is nothing on the other side.

## 615(1) Excerpt from argument on motion for bill of particulars

Justice BLAND. What about that allegation that you make that they were informed of the invalidity of the claim? I do not know the point you seek to make of the fact they were informed of the invalidity of the claim. Do you mean to say that goes to the intent?

Mr. STEFFEN. That is in Paragraph 46(a), subdivision (h), where it states the defendants have been informed of the invalidity. That simply raises the question of disclaimer, and in this brief we have withdrawn any assertion on that score. I agree with you that I do not think it is a valuable allegation and we are not insisting on it.

Justice BLAND. I was going to say, if the defendants were informed, they ought to look to the place where that information was given.

Mr. Steffen. My point here is, Judge Bland, it would be appropriate perhaps by way of interrogatory but not by way of bill of particulars.

Justice BLAND. Do you waive it?

Mr. Steffen. We waive it entirely, so that is out of the picture.

## 615(2) In the District Court of the United States For the District of Columbia

## Civil Action No. 8017

United States of America, plaintiff,

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING, WASHINGTON, D. C., Monday, November 15, 1943.

The above-entitled cause came on for hearing at 10:00 a.m., before Honorable Harold M. Stephens, Honorable Oscar E. Bland, and Honorable Finis J. Garrett, sitting as the District Court of the United States for the District of Columbia, pursuant to adjournment.

Appearances: On behalf of the Plaintiff: Roscoe T. Steffen, Esq., and Edward Knuff, Esq., Special Assist-

615(3) ants to the Attorney General. On behalf of the Defendants: Bruce Bromley, Esq., New York, N. Y., and George S. Collins, Esq., New York, N. Y., for defendants United States Gypsum Company, Avery and Knode. Elmer E. Finck, Esq., Buffalo, N. Y., Nicholas J. Knode. Elmer E. Finck, Esq., Buffalo, N. Y., Nicholas J. Chase, Esq., Washington, D. C., and Paul W. Lapey, Esq., Buffalo, N. Y., for defendants National Gypsum Company and Baker. F. W. H. Adams, Esq., New York, New York, and Peter Keber, Esq., New York, New York, for defendants Cortain tood Broducts Corporation and Hartley. ants Certain-teed Products Corporation and Hartley. nest H. Oliver, Esq., Washington, D. C., for defendants The Celotex Corporation and Dahlberg. Joseph P. Tumulty, Jr., Esq., Washington, D. C., and Alfred W. Varian, Esq., New York, New York, for defendants Ebsary Gypsum Company, Inc., and Ebsary James O'Donnell, Jr., Esq., Washington, D. C., and Benjamin P. DeWitt, Esq., New York, N. Y., for defendants Newark Plaster Company and Tomkins. David I. Johnston, Esq., Oklahoma City, Okla., and George E. H. Goodner, Munsey Bldg., Washington, D. C., for defendant Gloyd.

615(4) Colloquy re stipulation as to patents

Justice STEPHENS. At the last session of court, counsel were asked to stipulate, for the purposes of the

Motion to Strike and for Partial Judgment, with respect to Paragraph 46(a) of the Complaint, as to the form and content of the Roos Patents.

Has that stipulation been prepared yet?

Mr. BROMLEY. Yes, Your Honor, it is right here. (Stipulation handed to the Court.)

Justice STEPHENS. Gentlemen, that stipulation, probably due to my too general a statement as to what I wanted, doesn't quite fit what I desire to have. I wish to have a stipulation as to the exact form of each of the Roos Patents mentioned in Paragraph 46(a). This stipulation may be filed of record, but fearing that my directions might not have been sufficiently specific, I obtained from the Patent Office certified copies of the Roos Patents, and I will ask that they be handed to counsel and let them be inspected in comparison with the stipulation.

I think you will find they are correct, and I will be glad, if you can do so, if counsel will stipulate that those may be treated as a part of the record for the purpose of that Motion to Strike. Also hand the stipulation to counsel. (Copies of Roos Patents and Stipulation handed to

counsel.)

of 5 for a first of the form of that is that in my Opinion, I have printed the form of one of the Roos Patents complete, and I would like to have something in the record technically to support it.

Mr. Bromley. May it please Your Honors, the Defendants will stipulate that the five Roos Patents, certified copies of which have been handed to us, may be made a part of the record in connection with the Motion for Partial Summary Judgment.

Justice STEPHENS. Will you hand them to counsel for the Government? I think you will find them correct, Mr. Steffen. (Copies of Ross Patents handed to Mr. Steffen.)

Mr. Steffen. Your Honor, I should like to make a rather broad statement, that may take me about ten minutes, in this connection.

We are, as a preliminary matter, not willing to stipulate concerning the form of the patents. Your Honor asked us very specifically last time merely to stipulate as to the form of the grant, and we very carefully stipulated as to the form of the grant.

Your Honor asked whether the application dates were the particular application dates, and we understood that that was the matter that was in the Court's mind, and we stipulated that those application dates were correct and that the form of the grant was correct.

It has been our contention, if I may continue 615(6) here for a few minutes, it has been our contention throughout that as a substantive matter the validity or invalidity of these patents was a very material part of this case; or, in other words, basing our argument on the Sola Electric case, that the defendants may not fix prices and restrain trade on the basis of invalid patents, as a substantive matter; and our allegation in 46(a) is to the

effect that the patents are invalid.

That is a clean-cut, definite allegation of fact which is a necessary issue in this case, whether it comes up under 46(a) or whether it comes up under the defendants' pleadings under 35; and we therefore wish to take an exception to any ruling at this time—and I might say that we are very unprepared and that we haven't seen the Court's judgment, we don't know what the sweep of the Opinion may be—but we are very much opposed, if the Court's judgment is to be one of holding the question of invalidity not an issue in this case, we would have to take a very definite exception to that.

If the Court's judgment—and I am again going on a hypothesis—is that the matter of invalidity is completely out of this case, and that the defendants should have judgment on 46(a) before there is any evidence at all as to what those patents are, before the Court has even seen those patents, we think that the judgment is entirely premature;

and I will say further that we have given very 615(7) serious consideration to the posture of this case. The Court's opinion, if it follows that original opinion, I think goes clear beyond certainly what the United States Supreme Court has said in the Univis case, and it goes squarely counter to two very well-established lines of authority having to do with the invention, the need of showing invention, and having to do with the need to show

a concisely stated patent.

And I can say that we have considered whether it might not be desirable for the Division, the Government in this case, to either take a non-suit and try this case in another Court, or possibly to shape our record and take an immediate appeal.

This is not a matter of importance simply to this case, it is a matter of importance to a large number of cases. I think, as Your Honors are familiar, since 1926 one of the favorite devices of defendants has been to use patents

of whatever character and to formulate an agreement that they will all take out licenses, fix prices, and that they have then been able to make a very positive restraint upon trade.

It is a newer device whereby they can circumvent the Sherman Act, and what has happened in this case is typical. Therefore, we have had in many cases to raise this question of whether patents are going to be allowed to be used as a means of circumventing the Act.

We would therefore ask first that this case be put over at least one day, that we have a recess for at least one day, until we can consider what

our action should be.

Justice BLAND. Wouldn't it be better for you to read those Opinions before you make any radical statement?

Mr. Steffen. I say we don't know where we stand at the moment.

Justice Stephens. Mr. Steffen, you haven't given the Court an opportunity to tell you where you stand.

Mr. Steffen. All right, I will be glad to read the Opinion.

Justice STEPHENS. I am afraid that the matter is a tempest in a teapot, except to the extent that you wish to take an exception to any action of the Court. That, of course, you are entitled to, and your exception may be recorded. But so far as the form of these patents is concerned, I am afraid we are wasting time over a triviality.

I did want to put in my Opinion, as you will see when it is handed to you in a moment, the form of one of the Roos Patents, and to say that the balance of the Roos Patents followed that form. And I was referring to the

grant and not to the specifications.

I thought possibly counsel, in view of my rather general directions the other day, would stipulate, as they have stipulated, to the form of the Roos Patent. I thought it

might be a little more regular to have a stipula-

615(9) tion to the form of the Ro Patents.

I am not interested at all except as to the form of the grant. As far as the contents of the specifications are concerned, that is not material to the Opinion which I have written. However, when I asked the Patent Office to furnish me certified copies of the five Roos Patents mentioned in your pleading, Mr. Steffen, it didn't occur to me that either the defendants' counsel or the Government counsel could have any objection to there being made known to the Court the contents of the patent grants of the five

Roos patents which the Government itself has included in its

pleadings, or the contents of the specifications.

But if there is any objection on the part of the Government to the Court at the present time seeing the contents of the specifications, or if counsel for the Government are not willing to stipulate that the contents of the specifications may be submitted as a part of the motion with respect to Paragraph 46(a), then I will suggest and invite counsel for the defendants to offer as a part of the motion and to make as a part of the record, under the Motion to Strike Paragraph 46(a), the certified copies of the five Roos Patent grants which were just handed to counsel, but offer only those portions of them which certify the grant as distinguished from the specification.

That will protect you, Mr. Steffen, in every way.

615(10) Mr. STEFFEN. We would agree to that.

Mr. Bromley. May it please the Court, I offer in evidence the granting portion of each of the following numbered patents: Roos 1,914,345; Roos 1,938,354; Roos 2,017,022; Roos 2,079,338; and Roos 2,080,009, as a part of the record in connection with the Defendants' Motion for Partial Summary Judgment.

Justice STEPHENS. They may be made a part of the record.

You have no objection to that I take it, Mr. Steffen?

Mr. STEFFEN. That is correct. (Certified copies of the following Roos Patents were received in evidence: #2,080,-009 as Defendants' Exhibit 1; #1.914,345 as Defendants' Exhibit 2; #2,079,338 as Defendants' Exhibit 3; #1,938,-354 as Defendants' Exhibit 4; #2,017,022 as Defendants' Exhibit 5.)

Justice STEPHENS. I now hand to the Clerk a copy for the defendants and one for the Government's counsel, of the signed Judgment of the Court with respect to the Motion for a Dismissal of 46(a); and I now hand to the Court Property and to the Government and to the Defendants' counsel, a copy of the Opinion of the Court, including a dissenting opinion by Judge Bland.

615(11) Justice STEPHENS. The Court will be in session.

Mr. BROMLEY. I should like the record to show that I, personally, regret very much the necessity which compels the retirement of Judge Bland from this case. I know all the other defendants join me in this expression of feeling,

1/-

and we all want him to know that we wish him well in the future.

Mr. STEFFEN. I would like to underline everything that Mr. Bromley has said. We appreciate very much Judge Bland's interest and the care with which he has handled the arguments that have been presented, and we wish him well in every way.

Justice STEPHENS. I might ask at this time whether or not counsel for the defendants or counsel for the Government raise any question or objection to this change of judge?

Mr. BROMLEY. No sir.

Mr. STEFFEN. We make no objection.

Justice Stephens. We will be in informal recess for a few moments. The Court will be in session.

Mr. Steffen. I will say to you that with respect to your request for time we of course will give counsel for the Government, as well as counsel for the defendants, 615(12) time to read this opinion and this judgment, and make up their minds as to what further steps they wish to take, but we must reconstitute the Court this

morning because of Judge Bland's illness, as he must get a train to the Mayo Clinic this afternoon or evening.

615 (13) In the District Court of the United States for the District of Columbia Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING, WASHINGTON, D. C.,

Tuesday, November 16, 1943.

The above-entitled cause came on for further hearing at 10:00 a.m., before Honorable Harold M. Stephens, Hon-

orable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia, pursuant to adjournment.

Appearances. (Same as heretofore noted.)

615(14)

## PROCEEDINGS

Justice STEPHENS. I call the attention of the reporter to one or two minor corrections in the transcript of yesterday's proceedings. They are very small, but I might as well call your attention to them while I have them on my mind, Mr. Reporter.

On page 681, the third line from the top, the word "clause" should be the word "portion".

I may say that in making these corrections, I have not yet had proofread the Opinion of the Court which was copied in. I assume the correctness of that. My secretaries will proofread that in the usual course.

On page 735, the word "and" at the end of the third line,

should be "as".

I think that is all.

Mr. BROMLEY. May it please Your Honor, on page 681 I noticed that the five Roos patents have been marked as Defendants' Exhibits 1 to 5, inclusive, in this case. I am not sure that it makes any difference, but my offer was that they be a part of the record in connection with the Motion for Summary Judgment.

Justice STEPHENS. What page is that?

Mr. Bromley. 681, sir.

Justice STEPHENS. It says, "I offer in evidence the granting clause"—which is now "portion"—"of each 615(15) of the following numbered patents... as a part of the record in connection with the Defend-

ants' Motion for Partial Summary Judgment".

Yes, that would have been sufficient that far. It is not necessary or proper to describe them as evidence, because no exhibits have been offered yet, so far as the trial is concerned, and they are sufficiently identified by their numbers so that I should think the description of them as exhibits might be eliminated, Mr. Reporter.

Is there anything else of a preliminary character?

Have you any motions. Mr. Steffen?

## Motion for reargument

Mr. STEFFEN. Your Honor, we would like to renew our motion of vesterday that we be permitted at this time to have a reargument upon the matter of the right of the Government to introduce evidence to establish the allegations of paragraph 46(a) of the Complaint, which Your Honors have ruled upon.

Justice Stephens. What are your reasons for desiring a reargument?

Mr. STEFFEN. My reasons are, even after having read very carefully Your Honor's able opinion in the matter, that this, from the Government's standpoint, is a case of very great consequence, or a question of consequence; and we have one reason, that the bench has been changed, Judge

Jackson has been added since the argument was 615(16) originally made, and I think it is more or less usual to reargue a question where there has been

a change in the bench.

Second, the much more important question is that the Opinion is based upon, as I read it, a line of authorities which we didn't cite in our brief and which the defendants didn't cite in their briefs, and which were not argued at all before Your Honors; and it seems that in a matter of this consequence we should at least have an opportunity to express the Government's position upon those authorities.

We request, I think, about 30 minutes. This case has gone on for 3½ years, and an additional 30 minutes isn't

going to hurt, particularly.

Justice Stephens. Do you wish to be heard, Mr. Bromley?

Mr. Bromley. I object to it, sir, on the ground it is a pure waste of time; that the briefs were exhaustive, the oral arguments were extended, and the obvious care and attention which the Court gave to the matter, I think does not make appropriate a request for reargument.

He makes no contention he has anything new or that anybody overlooked anything, and it seems to me that it is a pure waste of time, under the circumstances. Therefore,

I oppose it.

Justice Stephens. Do you have any authorities to cite, Mr. Steffen, which were not decided at the time the briefs were submitted?

615 (17) Mr. STEFFEN. Yes, I have authorities which, in the light of Your Honor's opinion, would take on an entirely different significance.

Justice STEPHENS. I didn't make myself quite clear, I think. Do you have any cases to cite which were not decided by the Courts in which they were rendered at the time your brief was rendered?

Mr. STEFFEN. There have been no new cases that have come down in the last few days, but I urge very strongly that we at least have an opportunity to present the Government's view upon the line of authorities which Your Honor adopted, quite without any argument on our part and quite without any argument on the part of defense counsel.

Justice STEPHENS. I think that is not quite correct, Mr. Steffen. The defense brief urged in several places that the courts have no power, either directly or indirectly, to review the determinations of administrative agencies in the Government in the absence of statutory authority to do so. The argument was somewhat amplified in the Court's opinion, by the additional cases cited, which is not usually the subject of objection.

The Court will rule as follows on this request for re-

argument:

In the first place, the Court wishes to comment that the statement made yesterday by counsel for the 615(18) Government that the ruling was premature, we think is not well founded. The ruling on the motion to strike or for partial judgment dismissing paragraph 46(a) was made in advance of the actual calling of the case for trial at the request, indeed after several requests by counsel on both sides of the case during the several months preceding the argument, in order that counsel might be advised as to the necessity of preparation on the subject; and counsel informally arranged in the hearing in my chambers on the 10th of August that this matter might be raised in advance in the manner in which it was raised, and we think there is nothing premature about the decision of the Court.

The Court will deny the motion for reargument at the present time. The Court will say to counsel for the Government, however, that of course, the Government has a right to make a record in the case if it wishes to make a further record for purposes of appeal. It may make a proffer of testimony, either at the outset of the trial or during the trial. It may offer to prove, by calling a witness and offering to prove the invalidity of the patents alleged; if the Government wishes to make that record at the outset of the trial or later, it of course may do so, and at that

time if Judge Jackson, not having heard the argument, wishes to hear further argument, it will then be allowed.

Mr. Steffen. May I ask, Your Honor, that the 615(19) record show that we do not agree with the Court's statement on page 5 of the Opinion, that it was conceded in oral argument that the only question presented was whether or not the Patent Office, as an administrative tribunal, had erred in its findings. Our brief did not proceed on that, and I have searched our argument and I do not find that we made any such concession; in fact, our argument is exactly to the contrary.

Justice Stephens. The record may show counsel's statement of disagreement with the Opinion of the Court.

Mr. STEFFEN. Would Your Honors care to be favored with the Government's argument by way of a brief? We can formulate what I would say in this 30 minutes, and present it to you in writing.

Justice Stephens. No, I think the matter has been gone into so thoroughly and the Court gave such thorough attention to the matter, that it would not be proper to have

it reargued.

The Court can understand the disappointment of any counsel who is on the adverse side of a ruling, and the zeal and desire of counsel to reargue a case; but the trial is a practical affair, and we must move along with it, and we can't have rearguments every time we make an adverse ruling, especially where a matter has been so thoroughly argued and so thoroughly considered as this has been.

You may make a proffer of testimony on the 615(20) subject in order to make your record, in order

to insure your right to have full advantage of the adverse ruling for the purposes of appeal should the ultimate decision in the case go against the Government.

And if at that time Judge Jackson would like to hear additional argument, we will hear it, all three of us will hear it. But otherwise, the ruling of the Court will stand.

## Announcements by the Court

Are there any other preliminary motions? If not, one or two preliminary announcements will be made for the guidance of counsel during the trial of the case.

First, the formalities of procedure to be observed in accordance with the usual practice of Federal trial courts in the District. The rising of all persons at the instance

of the Marshal when the Court goes into or resume session. This little ceremony, at which it is to be noted that the Judges rise as well as counsel, is a mark of respect not to individuals but to the function which the Court and counsel are performing. The fact that we are engaged as lawyers and judges together in the common task of searching for the truth in the law and the proper application of the law in this case itself gives dignity to our proceedings, but these formalities are customary and necessary, and we will continue them.

The Court will ask counsel to stand, if it has not been the practice to do so in other jurisdictions, during 615(21) the examination of witnesses. That greatly promotes a workmanlike and speedy examination.

The Court will ask counsel to remain a substantial distance away from the witness, preferably at counsel table or at the lectern, during the examination of the witness. Exceptions, of course, to this occur with respect to the presentation and inspection of exhibits, but in general this rule will be followed. The purpose of the rule is not a formality but because of the fact that if counsel stand a reasonable distance away from the witness, both counsel and the witness keep their voices lifted; whereas, otherwise both of them drop their voices and we don't hear. My experience in the trial of cases has brought that out very clearly.

As far as the arrangements of tables for the convenience of counsel are concerned, there are so many lawyers here that it is a little difficult. We have had additional tables moved in, with the hope that enough of them would be there for each of defendants' counsel as well as Government counsel. If there are not enough, we will get more.

If it would be preferable to counsel to remove the lectern entirely and put tables in the form of a square so that there be more sides of a table to sit at, that is entirely agreeable. We will leave those arrangements largely to the convenience of counsel, and the Marshal may consult me, if necessary.

615 (22) If papers are to be handed to the Court for inspection or to witnesses, that will ordinarily be done, as a matter of convenience, through the Clerk; or if the Clerk is not available, through the Marshal.

We are commencing a trial, gentlemen, which bids fair to be extended and complicated. Our task of searching for the truth and ascertaining and applying the law will be greatly aided if there is a cooperative spirit and good feelOng on the part of all in the case, toward the Court, toward counsel, toward witness. The trial is, of course, in some sense a contest, but it is a contest which can be carried on with good feeling toward the Court and good feeling toward each other, as far as counsel are concerned. Such a spirit will greatly aid the conduct of the trial.

Heat in trials usually shuts out light. We do not mean by this that we expect counsel not to conduct their case in a vigorous and spirited manner. That is customary and

proper, but it may be done with good feeling.

The Court expect counsel to abide adverse rulings with good grace and without expressions of resentment toward the Court. It is recognized that lawyers are human, but in the zeal of controversy sometimes are tempted to overstep themselves. Their proper recourse against rulings which they feel are erroneous is by appeal, and not by expressions of dissatisfaction and resentment.

615(23) This does not mean that counsel are not to feel entirely free at all times to take such steps as they feel necessary, take all proper steps for the purposes of appeal, to advance every right which is necessary for the protection of their clients on both sides of the case. But their proper recourse against rulings which they feel are erroneous is by appeal or by the proper steps for taking appeals, and not by expressions of dissatisfaction or resentment.

The Court wishes to have counsel feel at ease in the court, and not to feel that there are a lot of unnecessary formalities or pretentions. Nevertheless, the Court must be conducted with dignity and such formality as is necessary

for efficiency.

We regret to feel obliged to say that the episode yesterday, in which counsel for the Government expressed the possible purpose to dismiss this case because of the adverse ruling on the motion to dismiss paragraph 46(a) in order to seek another court in which to try the case, was passed over at the time because the Court thought that perhaps counsel did not fully appreciate, in the haste of the moment, the unpleasant implications of the statement. But the Court wishes counsel to understand that it does not condone such statements, which are a reflection upon the fairness of the Court. The proper remedy is by appeal.

Adverse rulings are bound to occur in the course 615(24) of a trial in respect to both parties, and the Court expects the parties not to agree with them, but to

abide them with grace and courtesy. By this it is not meant

that the Court desires to deny the Government the right to make any motion it sees fit, and that motion will be given full and fair consideration.

If there are no preliminary motions, the first witness may

be called.

I believe you were going to make an opening. Judge Jackson suggests, gentlemen, that he has given a very careful study to the pleadings, and I think has had time to examine the preliminary memoranda which have been submitted by the defendants, and he has read the Opinion of the Court recently rendered; and that as far as he is concerned, you need not make an extended opening, nor more of an extended opening than you would for those who have been associated with the case from the beginning.

But I shall not restrict counsel, and they may make such

opening statement as they wish.

Mr. STEFFEN. We requested yesterday the privilege of making a brief opening statement, partly in order to aid Judge Jackson and partly to make clear the structure of the Government's argument, and I would like to proceed to make that statement now.

May I say at the outset, in regard to Your 615(25) Honor's reference to exceptions just now, that it is my understanding that in the course of the trial, as evidence is being put on, that it is not our or the defendants' obligation to note an exception. That is taken for granted?

Justice Stephens. The new rules do not require that.

Mr. Steffen. That is correct, that is my understanding. Justice Stephens. You are correct.

Mr. STEFFEN. And as respects possible errors in the proceedings up to date, I take it that we do not need to note an exception there either, do we?

Justice STEPHENS. I don't think so, Mr. Steffen, my understanding under the new rules is that the formality of taking exceptions is not necessary. However, in order to adequately protect you, if there is any doubt about it the record may show that you note an exception to any adverse ruling which may have occurred thus far against the Government. That would include the granting of the motion to strike or for partial judgment under paragraph 46(a), and there have been one or two other adverse rulings, which I don't recollect. If you wish to aggregate them accurately

and present them, the Court will note an exception in the record for you with respect to each one of them.

Mr. Steffen. I am not prepared at the moment to list them.

Justice STEPHENS. I understand that, but you 615(26) may do that if you think it is necessary.

Mr. Bromley. Would that apply to all parties,

sir?

Justice STEPHENS. Yes, sir.

616 In the District Court of the United States For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY-GYPSUM COM-PANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHL-BERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING, WASHINGTON, D. C., Wednesday, November 17, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia, pursuant to adjournment.

Appearances. (Same as heretofore noted)

617 Justice STEPHENS. You may proceed, gentlemen.

## Offers in evidence

Mr. STEFFEN. We offer in evidence Government's Exhibits 1 to 5, inclusive, which have been marked for Identification. These exhibits are photostats of the license agree-ments entered into between USG and the companies mentioned therein, for the manufacture and sale of board under the Utzman patent. These agreements are as follows:
No. 1—Agreement between United States Gypsum Com-

pany and Beaver, dated July 29, 1926. That was the orig-

inal agreement.

No. 2—Agreement between USG and Universal, dated September 17, 1926.

No. 3—Agreement between USG and National, dated May 16, 1929.

No. 4—Agreement between USG and Certain-teed, dated May 22, 1929.

No. 5—Agreement between USG and Ebsary, dated

May 22, 1929.

The foregoing exhibits are all the license agreements entered into by USG under the Utzman patents, except the agreements between USG and Atlantic, Texas and Niagara. The Atlantic agreement was dated March 5, 1927, and

The Atlantic agreement was dated March 5, 1927, and the Texas agreement was dated April 18, 1927. It is admitted by USG in paragraph 50 of their answer that these two agreements are substantially the same as the Beaver and Universal agreements. The Niagara agreement was dated in May, 1929, and in paragraph 61 of the USG answer it is admitted that this agreement was similar to the Ebsary agreement.

These are the basic agreements which will be introduced for purposes of showing, as the Government contends, the

initial combination between the defendants.

As I have stated, they have been substantially admitted in the answers, each of the defendants, however, asking leave to refer to the original at the trial. We now are producing either originals or photostatic copies of the originals.

I may say further that these agreements were introduced in the criminal case before Judge Golds-19 borough, and the defendants there stipulated, for

the purposes of that case, that they, being original documents, would be admitted without question.

Justice STEPHENS. Are these the originals or the photostats?

• Mr. Steffen. Photostats of the originals. I will submit them to defense counsel. (Documents handed to defense counsel.)

Mr. Steffen. I may say that we have photostatic copies of all letters and memoranda, but these run into such volume that it would be impossible to photostat all of these agreements without a very great expense, and they are, moreover, set out in the Appendix to the Complaint. So you have before you substantially the wording, in fact the exact wording of the agreements.



Justice STEPHENS. You have no photostatic copies of these particular agreements for the Court?

Mr. STEFFEN. Not sufficient to give each member of the Court. We have sufficient of the letters and memoranda so that each member of the Court may have a photostatic copy.

Justice STEPHENS. Do you have enough to give one member of the Court a copy? The reason I ask that is that I am trying to keep, through my secretarial staff, an abstract of the testimony as it goes along, and an index of

exhibits to the transcript, for my own convenience and possibly for the convenience of counsel in the case, and it would help me if I could have, myself.

case, and it would help me if I could have, myself, a photostatic copy of each of the exhibits introduced. I don't ask you to do the impossible.

Mr. STEFFEN. We can have them photostated and make up a copy.

Justice STEPHENS. Thank you very much.

Justice GARRETT. I understood Mr. Steffen to state that the text of all those proposed exhibits is printed in the Bill of Complaint; is that correct? Or are they just referred to, I mean in the Appendix?

Justice Jackson. Are they all there, Mr. Steffen?

Mr. STEFFEN. No, they are not all there. There is a sample of each one there, not each one of them. We have in the Appendix to the Complaint the original Beaver agreement. That was the one upon which they laid this plan.

Then we have the Ebsary agreement set out, which is agreed by all defendants in their answers to be substantially identical with the other exhibits which we are now

offering.

Mr. Bromley. Subject to our right to compare these documents to see that they are accurate copies, we have no objection to the five exhibits.

Justice STEPHENS. Those are United States Nos. 1, 2, 3, 4, and 5, are they?

Mr. STEFFEN. Yes.

dence. (The five photostatic copies of license agreements referred to were marked as Government's Exhibits 1, 2, 3, 4, and 5, and were received in evidence.)

Mr. ADAMS. May I be heard?

Justice STEPHENS. I am sorry.

Mr. ADAMS. With respect to the Certain-teed license, of course, I will admit that subject to the inspection of the actual license. I haven't admitted in our answer the licenses of the other defendants, I don't know anything about them.

Secondly, as I understand it, there is a statement made here that these other licenses of Atlantic and Texas and Niagara were substantially identical with these licenses. We have said in our answer that we deny any knowledge or information about that. We do not have before us the licenses of these other companies, we have never had them, and we have no way of knowing whether they are substantially identical or not. And I object to any suggestion that I am agreeing now that they are substantially identical.

Mr. Steffen stated that USG, in its answer, agreed or admitted that they were substantially identical. That, I take it, is the fact, but we did not, and I object to any such statement as binding on Certain-teed Products Cor-

. portion.

Justice STEPHENS. I don't quite get your objection. These agreements are between USG and Beaver, USG and Universal, USG and National, USG and Certain-teed, and USG and Ebsary. Now you represent Certain-teed?

Mr. ADAMS. That is right.

Justice STEPHENS. Are you objecting to the admission of the exhibits or to the statement of counsel?

Mr. ADAMS. Well, I have two parts of it, if I may make it clear.

As to these five exhibits, I have no objection to the Certain-teed license being admitted. I do object to the other licenses in that they are not binding on us, and they have not been identified or proved in any way. We do not admit them in our answer, and I specifically object on the ground that those agreements are not binding on us.

Secondly, in so far as the statement of counsel is concerned—and I take it he is referring to the Complaint and Answers—he says that licenses were entered into with Atlantic and Texas, and I believe Niagara, which were substantially identical with the Beaver license; and he

says that USG, in its answer, admitted that.

In our answer we did not admit that. We had no basis, and still have no basis, for making any such admission. I do not want it to be taken that I agree that the other licenses were similar to the Beaver license, nor do I agree that even if they were, they are binding upon us in any way.

Justice Stephens. Well now, of course, you are entitled to make a statement, Mr. Adams, as to what you agree to and admit, or do not agree to and do not admit, and that

may appear in the record.

With respect to Mr. Adams' objection to the agreements introduced, other than the one between Certain-teed and USG, because not binding upon Certain-teed, do you wish to be heard on that, Mr. Steffen?

Mr. STEFFEN. I think it is premature to raise that question. It seems to me perfectly clear that if the agreements have been introduced and they are admitted to be valid agreements, that that is all that the Government contends for at this time.

that while in a technical sense the agreements between the other defendants mentioned and U.S.G. are not contracts binding upon Certain-teed, because Certain-teed is not a party to them, that nevertheless they are relevant to the general charges against all the defendants in the case that there were a series of agreements and a combination of agreements. The Government must prove its case on numerous agreements and circumstances and documents, and therefore your objection in that aspect is overruled.

Government's Exhibits 1 to 5 inclusive are therefore admitted in evidence subject to the right of counsel for the U.S. Gypsum Company to compare them with the originals

for the purpose of testing their accuracy.

I believe the exhibits are to be kept in the custody of the reporters for the convenience of all concerned, and they will be returned to the reporters.

Mr. Adams. This objection which I have just made is perhaps illustrative of the objections which will be taken throughout the course of the trial from time to time, and it is our suggestion that it be agreed that every objection taken by one defendant will inure to the benefit of all other defendants. That will avoid the necessity of each counsel for each defendant rising on each occasion and making such an objection, repeating in effect the objection

625 just made by some other counsel.

Justice STEPHENS. That would be a very convenient rule if all the parties defendant agree to it.

Mr. Bromley. I agree to it.

Mr. FINCK. And I agree to it.

Justice STEPHENS. Is there any defendant not represented today?

Mr. Finck is here; Mr. Adams is here; Mr. Oliver is here;

Mr. Varian; Mr. O'Donnell, and Mr. Johnston.

Unless some defendant's counsel objects to that suggestion, the Court will accept it, that any objection made by any defendant in the case to the admission of testimony or evidence will inure to the benefit, so far as applicable, of all defendants.

Very well, that will be understood.

Mr. STEFFEN. We now offer in evidence Government's Exhibits 6 to 16, inclusive, which have been marked for identification.

Exhibits 6 to 13, inclusive, and Exhibit 15 are the original or photostatic copies of the license agreements entered into between U.S.G. and the companies mentioned therein for the manufacture and sale of board under the Hite and Haggerty patents, and the Roos application for patent. These are the agreements appearing in the complaint, a

copy of which appears in the complaint as Exhibit 626 6. We have set out in the complaint, Exhibit 6, the Ebsary agreement, and these are the agreements comparable to that agreement.

Exhibit No. 6-between U.S.G. and Universal, dated

November 5, 1929.

Exhibit No. 7—between U.S.G. and Atlantic, dated October 21, 1929.

Exhibit No. 8-between U.S.G. and Texas, dated Feb-

ruary 10, 1937.

Exhibit No. 9—between U.S.G. and National, dated October 17, 1929.

Exhibit No. 10—between U.S.G. and Certain-teed, dated

October 15, 1929.

Exhibit No. 11—between U.S.G. and Ebsary, dated October 18, 1929.

Exhibit No. 12—between U.S.G. and Niagara, de'ed October 8, 1929.

Exhibit No. 13—between U.S.G. and American, dated November 25, 1929.

Exhibit No. 15—between U.S.G. and Kelly, dated April 23, 1930.

Exhibit No. 14 is an assignment and bill of sale, dated April 12, 1939, between American and Celotex, conveying

to Celotex all the assets of American, including the license

agreement between U.S.G. and Arrican (Exhibit 13).
The U.S.G.-American agre of November 25. of November 25. 1929, in paragraph 5, page 1. eof, provides that the license agreement may be igned by licensee to any company acquiring all the assets and business or all the capital stock of licensee, on condition that the licensee shall first obtain an agreement in writing from such assignee agreeing to assume all the obligations of licensee."

In the bill of sale: Celotex assumes American's obligations

as licensee.

Exhibit 16 is an agreement, dated January 3, 1929, between U.S.G. and Newark, whereby U.S.G. consents to the assignment by Kelly to Newark of the license agreement between U.S.G. and Kelly. (Exhibit 15.) In this agreement Newark assumes the U.S.G.-Kelly license agree-

ment of April 23, 1930.

By the offer of these various contracts, we have shown the original agreements signed and executed in 1929 and early in 1930, and have also introduced, or are offering to introduce, the assignments which, in the case of two companies—the Kelly Plasterboard Company which assigned to the Newark people, and the American assignment, when they assigned to Celotex. In both cases, Celotex, which is a defendant here; and Newark, which is a defendant here, became parties to the agreement to the full extent and the same extent, so far as the terms of the agreement are concerned, as did the other parties who had signed at the original time.

628 We offer these in evidence, and I will show them

to defense counsel.

Mr. BROMLEY. Subject to our right to check for accuracy, we have no objection.

Justice STEPHENS. Is there any objection by any of the other defendants?

Mr. OLIVER. I yet, Your Honor, haven't had a chance to look at Exhibit 14 which directly affects me.

Justice STEPHENS. Take your time and look at it; you are entitled to look at it.

Mr. OLIVER. I have no objection to Exhibit No. 14, subject of course to check for accuracy against the original.

Justice Stephens. Exhibit No. 14 is what?

Mr. OLIVER. It is in two parts, an assignment and bill of sale, American to Celotex; and memorandum agreement between American and Celotex.

Justice STEPHENS. Does any other defendant have any objection to offer? If not, the exhibits mentioned are received in evidence, subject to the right of counsel to check their accuracy against the originals.

(The documents referred to, marked Government's Exhibits Nos. 6 to 16, inclusive, were received in evidence.)

Justice STEPHENS. I would like to suggest to you, Mr. Steffen—I assume that these agreements which are part of the complaint are introduced for the purpose of proving your general charge of conspiracy and combination, and that you rely upon the agreement as a whole. Where you are relying upon particular portions.

a whole. Where you are relying upon particular portions of the agreement or of any exhibit, if you will call our attention to it at the time, it would be of great help to the Court in getting acquainted with the evidence as it goes along.

Mr. STEFFEN. I would be glad to do that, sir.

Mr. OLIVER. May I make a suggestion here? It seems to me that in attempting to check and verify these copies against the originals, it is going to be very difficult for counsel to do so unless they have a copy of the exhibit, and I was wondering if it would be asking too much of counsel for the Government to at least let the defendant's counsel who is directly interested in a particular exhibit, have one copy.

Justice STEPHENS. Well, that depends upon the possibilities, I suppose. I am sure the Government will be glad to do it if they can, but the question of furnishing so many photostats I suppose is a pretty serious question.

Mr. Knury. I don't think we have any other copies, other than what we have introduced here in evidence today. You will notice that the first copy of the second group of exhibits is an original; we didn't even have a photostat of that made.

Justice STEPHENS. Let me say this to you, Mr. Oliver. These exhibits, for convenience, will be left in the custody of the court reporter's staff. They will not be taken from this building. There is an exhibit room here, and the court reporters, I presume, could have someone available immediately after the adjournment of Court so that you can see the exhibit itself and compare it with your own original, if you have one. I am afraid we cannot ask the Government to perform the impossible; if they haven't got them, they haven't got them.

Mr. Steffen. We now offer in evidence Government's Exhibits 17 to 25, inclusive, which have been marked for

identification.

Exhibits 17 to 22, inclusive, and Exhibit 24 are the license agreements entered into between U.S.G. and the companies mentioned therein, for the manufacture and sale of metallized board. I might say to the Court that Exhibit 11 in our complaint gives a sample of these agreements which we are now offering in evidence.

These agreements are as follows:

Exhibit No. 17—between U.S.G. and Universal, dated

April 4, 1935.

Exhibit No. 18—between U.S.G. and Atlantic, dated November 30, 1934. Exhibit No. 19—between U.S.G. and National, dated

October 5, 1934.

Exhibit No. 20-between U.S.G. and Certain-teed, dated November 2, 1934.

Exhibit No. 21—between U.S.G. and Ebsary,

631 dated August 14, 1935.

Exhibit No. 22—between U.S.G. and American, dated December 4, 1934.

Exhibit No. 24—between U.S.G. and Kelly, dated Octo-

ber 12, 1934.

Exhibit No. 23 is an agreement between American and Celotex, dated April 12, 1939, whereby Celotex agrees to assume the license agreement between U.S.G. and American, dated December 4, 1934 (Exhibit No. 22). The U.S.G.-American agreement of December 4, 1934, in paragraph VII, page 5 thereof, made provision for such a contingency.

Exhibit No. 25 is an agreement between U.S.G. and Newark, dated January 3, 1939, whereby U.S.G. consents to the assignment by Kelly to Newark of the license agreement between U.S.G. and Kelly (Exhibit 24). In this agreement, Newark assumes the U.S.G.-Kelly agreement of

October 12, 1934.

I offer these in evidence and will show them to defense counsel.

Mr. Bromley. No objection, subject to the same arrangement:

Justice STEPHENS. Have the other defendants concluded with their examination?

Mr. OLIVER. May I inquire of Mr. Steffen as to whether or not he has a copy of Exhibit 23 which will legibly show the signatures? This copy I have does not.

Mr. Knuff. I think, if I may answer Mr. Oliver's question, that that is the only available copy we have. We may have in our files the original of that, I am not sure, but if Mr. Oliver will take it up with me, I will endeavor to look at our files and see if we have the original.

Justice STEPHENS. Very well, accommodate him if you can, Mr. Knuff.

Mr. OLIVER. Then, if Your Honor please, subject to check for accuracy against the original, I have no objection to Exhibit 23.

Justice STEPHENS. If no other defendant has objection, and if counsel for all defendants have completed examining the exhibits, the last series of exhibits offered, being Government's Exhibits 17 to 25, inclusive, are admitted into evidence subject to check for accuracy.

(The documents referred to, marked Government's Ex-

hibits 17 to 25, inclusive, were received in evidence.)

Mr. STEFFEN. We now offer in evidence Government's Exhibits 26 to 32, inclusive, which have been marked for identification.

Exhibits 26, 28, 30, and 31 are photostatic copies of license agreements between U.S.G. and the companies mentioned therein, for the manufacture and sale of perforated lath. We have set out in the complaint, as Exhibit 12, the

633 Certain-teed agreement, and these agreements relate to paragraphs 115 to 120 of the complaint. These agreements are:

Exhibit No. 26-between U.S.G. and Certain-teed, dated

June 8, 1936.

Exhibit No. 28—between U.S.G. and Ebsary, dated February 2, 1937.

Exhibit No. 30-between U.S.G. and American, dated

July 10, 1936.

Exhibit No. 31-between U.S.G. and Kelly, dated June

23, 1937.

Exhibits 27, 29, and 32 are letter agreements between U.S.G. and the companies mentioned therein, granting royalty-free licenses to said companies to manufacture and sell perforated lath. These letter agreements are the ones that were made between U.S.G. and certain of its licensees in 1938, after the industry had raised a discussion as to whether the patents in question were valid, and certain of the members of the industry refused to take out licenses for that and other reasons.

Mr. Bromley. I object to any such statement as that. That is not evidence and I move to strike it out.

Mr. Steffen. That was simply for the information of the Court.

Mr. BROMLEY. It is an easy way to prove your case.

Justice STEPHENS. The Court will not treat it as evidence; it is descriptive, Mr. Bromley, of the general purpose of the introduction of the exhibits.

Proceed, Mr. Steffen.

Mr. Steffen. These letter agreements are as follows:

Exhibit No. 27—letter of U.S.G. to Certain-teed, accepted October 4, 1938—

Mr. Bromley (interposing). Haven't you already had an Exhibit 27, the Ebsary contract?

Mr. STEFFEN. No.

Exhibit No. 29—letter of U.S.G. to Ebsary, accepted January 10, 1939.

Exhibit No. 32-letter of U.S.G. to Newark, accepted

January 3, 1939.

These we offer in evidence, and I will show them to defense counsel.

Mr. Bromley. Subject to the same arrangement, we have no objection.

Justice STEPHENS. Have the defendants completed their examination? If so, Government's Exhibits 26 to 32, inclusive, are received in evidence, subject to the right of the defendants to check them for accuracy.

(The documents referred to, marked Government's Ex-

hibits 26 to 32, inclusive, were received in evidence.)

Mr. STEFFEN. We now offer in evidence Government's Exhibits 33 to 39, inclusive, which have been marked for identification.

These exhibits have to do with the bulletins, the license agreement bulletins, which were issued by U.S.G. from the time that the license agreements were put into effect. They were all supplied to us under subpoena; they were all introduced before the Court in the criminal action, excepting one, Exhibit 39, which has to do with perforated lath; and which was excluded because of the ruling, I believe, that perforated lath had no part in that case.

I will show these exhibits to defense counsel.

I might say for the information of the Court that we have one bulletin as Exhibit 7 in the complaint, and paragraphs 90 and 91 of the complaint relate to the matters with which these are concerned.

Mr. FINCK. If the Court please, may I interrupt at this point?

Justice STEPHENS. Mr. Finck.

Mr. FINCK. I assume that Exhibits 26 to 32, inclusive, which are the perforated lath agreements, are admitted for what they are worth. Of course National Gypsum Company was not a party to any of the perforated lath agreements, and did not take a license under the perforated lath patents, so that they would not be binding upon National Gypsum Company. But I assume that all of these exhibits are admitted by you for what they are worth, and that you will apply them as against the defendants which

have made the agreements.

Justice Stephens. Unless counsel point out, or unless it should occur to the Court upon inspection, that they are not relevant, they will be considered, as far as they are relevant, as bearing on any defendant in the case.

Mr. FINCK. We object to them as being incompetent, irrelevant, and immaterial, and not binding on National. I don't suppose the Court would like to have us interrupt every minute to make that objection, because there are many letters here, and documents, which will have to be objected to by various counsel.

Justice STEPHENS. Well, you must feel free to interrupt, gentlemen, when you feel that you must do so to protect the record. To the extent that you can agree upon class objections, or class admissions, of course that is desirable in the interests of saving time, but you are entitled to interrupt when you want to object to any particular exhibit as not competent, relevant, or material to your particular defendant.

You do object to this class of exhibits?

Mr. FINCK. I do.

Justice STEPHENS. As in no way binding upon or relevant to the case as charged against National?

Mr. FINCK. Yes; that is as to Exhibits 26 to 32.

Justice STEPHENS. That is the series just offered?

Mr. FINCK. No, the prior series.

Justice STEPHENS. Well, just wait a moment until we have the attention of all counsel, and we will then take the matter up.

Mr., FINCK. Yes, sir.

Mr. BROMLEY. Subject to the same arrangement, we have

no objection to these bulletins.

By failing to object, I do not mean to infer that we admit that these bulletins were sent out to anybody who did not have a license and whose prices were not subject, therefore, to regulation under the license.

Justic STEPHENS. That statement may appear in the record. Does any other defendant have any objection to this last group of exhibits?

Mr. JOHNSTON. If the Court please.

Justice STEPHENS. Mr. Johnston.

Mr. JOHNSTON. First as to these exhibits, and then I want to go back to what Mr. Finck spoke about.

Justice STEPHENS. We will take that up later; we are now dealing with Exhibits 33 to 39, inclusive. What about them, Mr. Johnston?

Mr. Johnston. Exhibits 33 to 39 have to do with these bulletins. Our contention is that we did not have any bulletins from 1929 to 1937, and that these would not be binding on us. I do not know, I have not examined them,

whether they are being introduced as bulletins, or copies of bulletins, that were sent to us. There is no proof here now that they ever sent any bulletins to Texas, and until there would be some proof, I would want to object to these insofar as Texas is concerned.

Justice STEPHENS. Mr. Steffen?

Mr. STEFFEN. We agree that at the appropriate time objections could be made. We have to introduce this as a preliminary matter.

Justice STEPHENS. You expect to connect it by showing that it did reach the attention of Texas, of Mr. Gloyd, or that such bulletin did?

Mr. Steffen. We may or may not as far as Texas is concerned, and if, of course, we fail to show that they are a

party to the conspiracy, they can ask for a dismissal at the appropriate time.

Justice STEPHENS. But it is your purpose to show that, if your evidence is sufficient?

Mr. Steffen. That is correct.

Mr. FINCK. If the Court please, on behalf of National and Baker. I object to any bulletins introduced referring to perforated lath. National did not have a license under the perforated lath patents, and therefore they cannot be binding on those defendants.

Justice STEPHENS. What do you say to that objection, Mr. Steffen?

Mr. STEFFEN. What I say, Your Honor, is that it is true that so far as we know, National did not have a perforated lath license agreement, but we want to show the whole situation in the industry and to show the reasons why National did not take out a perforated lath license agreement, and to show their part in that as indica-

tive of being parties to this combination.

I think all of these objections are very premature for the reasons that they go to the relevancy and whether they are binding upon a particular defendant in proving a combination or conspiracy. We will put our first witness on, and he will testify as to one isolated transaction. Every one that is not involved in that can say, "We were not a party to that," and obviously they were not. We have to tie this all together in due time.

Justice STEPHENS. I think the Government's position is correct in respect of that, gentlemen. Of course these exhibits which are now under consideration, with respect to the bulletins, do not of themselves prove, and are not received in and of themselves alone to prove, that either Texas or National, either Mr. Gloyd, doing business as Texas, or National and Baker, received bulletins. Nevertheless, the Government cannot prove all of its case out of one exhibit or one witness, nor can any other party do so. I

think they are admissible subject to connection with other proof which would indicate that the system or scheme which is charged by the Government was in operation to the knowledge of all the defendants. I assume that that is why you are offering them, gentlemen?

Mr. STEFFEN. That is correct.

Justice STEPHENS. That objection is overruled on behalf of Mr. Finck for National and Baker, and on behalf of Mr. Johnston with respect to Gloyd, doing business as Texas, with respect to this last set of exhibits, 33 to 39, inclusive.

(The documents referred to, marked Government's Exhibits 33 to 39, inclusive, were received in evidence.)

Mr. OLIVER. I am in the same position as National on Exhibits 26 to 32, on the perforated lath. We have never had any contract on perforated lath at any time, or today, and we did not come into the gypsum industry until April 12, 1939. We have never seen a board bulletin before.

Justice STEPHENS. Well, it is entirely proper and natural for you to make that objection, and it is entirely proper for you to feel free to do so. At the same time, the Government cannot be expected to prove all its case at once, and it seems to me and to the Court that the exhibits are admissible at this time. Of course, if they are not in some manner connected properly before the end of the case, there might be a motion to strike with respect to particular defendants. But at the present time they are admissible.

Gloyd on perforated lath. We did not have any contract on perforated lath. We did not have any contract on perforated lath; and while I am on my feet, I have been wondering about this thing. I can see a very extended time here in the matter of these objections. Isn't there some method by which we could rather unify that, so that it wouldn't make such a voluminous record, and yet our record might be saved, our exceptions?

Justice Stephens. Have you a suggestion as to how it can be unified?

Mr. Johnston. Yes, I have one. If the Government would submit to us in advance these documents and exhibits they expect to offer, so that counsel might have time to look them over before they are offered. I have done that in other cases, and I am sure it would facilitate the thing very greatly here.

Justice STEPHENS. Great minds run in the same channel—that suggestion had occurred to me, but I was a little loath to make it because I know of the great number of documents to be dealt with, and the problem of organizing them. If it can be met, however, by the Government, if the Government could submit these proposed exhibits for a given day, the afternoon before, or at 9:00 o'clock in the

morning of the same day, it would save a great deal of time. I was considering suggesting that if it is not an undue burden upon the Government. It would save a lot of time if all these exhibits could be gone over in advance of the time at which they are offered, so that counsel can correlate their objections and get them

ready.

I think also, Mr. Johnston, as the case develops, it may turn out—we are just getting started and there is always a little period of experimentation in commencing a trial as to how best to handle it—and I think perhaps classes of objections will be developed which can be made in a unified manner—and I appreciate suggestions along that line. If the Government can cooperate in that, the Court will ask them to do so.

Mr. OLIVER. May it be understood, Your Honor, that what I said concerning Exhibits 26 to 39, inclusive, was intended to be a specific objection on the part of Celotex?

Justice STEPHENS. It may be so understood, and the same ruling will be made with respect to these objections, as on similar objections by other defendants.

Mr. FINCK. Referring to Exhibits 26 to 32, inclusive, Your Honor, I object to those as being incompetent and Himmaterial, and not binding on National.

Justice STEPHENS. Because National had no contract with U.S.G., or no license in respect to perforated lath?

Mr. FINCK. Yes.

Justice STEPHENS. Well, the exhibits are not re-643 ceived to prove a contract with National, they are not offered for that purpose, as I understand it, but they are received as a part of the Government's case, offered as tending to prove the general conspiracy and system, of which all were aware eventually, and your objection is therefore overruled and exception noted.

Mr. Steffen. We now offer Exhibits which have been marked for identification as Government's Exhibits Nos. 40 to 42 inclusive. These exhibits are freight rate schedules for the New York area, the Michigan area, and the Ohio area. They were introduced in evidence at the crim-

inal trial and are necessary as a means of calculating price under the price bulletins.

I offer them in evidence and will show them to defense

counsel.

Mr. OLIVER. May I ask, Mr. Steffen, what period they cover?

Mr. STEFFEN. That is shown on the face of them. They cover a number of years, carrying right on down to 1939 and 1940.

Mr. Bromley. We object to Exhibits 40, 41, and 42 for identification, on the ground that they are immaterial and incompetent, and particularly because no proper foundation has been laid. They appear to be a schedule of freight

rates issued by something called the Gypsum Institute. They were not received in the criminal case,

 they were excluded on my objection. They were only marked for identification in the criminal case.

Justice STEPEHENS. Is the Gypsum Institute not mentioned in the pleadings?

Mr. Bromley. I believe not. The Gypsum Statistical Institute is mentioned, but that is not this thing.

Justice STEPHENS. Is the Gypsum Institute not menthat?

Mr. STEFFEN. It is our understanding that they are relevant because of the fact that the price bulletins require prices on a delivered basis, and it is necessary, to calculate the freight rates from a given point, to include in the prices that are specified in the price bulletin.

This is one means of establishing the freight rates that pertain to given areas. They were supplied to us under subpoena, and they were offered—we are not clear whether

they were admitted or not.

It is my understanding, and Mr. Knuff's understanding, that they had been admitted in evidence in the criminal trial. That we will have to verify.

Justice STEPHENS. I have some question in my mind as to whether they are admissible unless you show that they were issued either by some one of the defendants; or sent

to and acted upon by some one of the defendants. If some third party, not connected with the case, issued a freight bulletin, that would be irrelevant as far as the defendants are concerned, wouldn't it? Mr. Steffen. I should think so. Isn't it a matter of connecting that up by further testimony to show the use made by the industry of these tables? I would ask, therefore, that they be admitted subject to being tied in as being relevant and material, by other evidence.

Mr. OLIVER. If Your Honor please, I think the objection goes deeper than that. The best evidence of freight rates are the tariffs themselves. These certainly are not tariffs.

Furthermore, they contain pencil notations—there seem

to be changes of figures in them.

Now, certainly, just to dump a mass of such documents, which possibly is somebody's draw-off of what he thinks was the freight rate in the tariff, and by someone who has no connection whatever with the parties involved in this proceeding, I think is clearly objectionable.

Justice STEPHENS. Hand them to the Marshal and let the Court inspect them.

(The documents referred to were passed to the Court.)

Mr. STEFFEN. We are not trying to prove that these are the freight rates, but we are expecting to prove that these are the documents that the defendant companies would

make use of in calculating the prices at which they sold gypsum. Therefore I would say that it makes no difference whether they were genuine or not.

Justice Stephens. Yes, I would think that that objection was not very well taken. If the Government can show that these documents were used by the defendants in connection with their alleged bulletin practices, it doesn't make any difference whether they were sent out by the Interstate Commerce Commission or the railroads or by whom, if they are a part of an alleged price-fixing system. The question is whether they are connected.

Mr. OLIVER. But the part of the transportation charge, in the transportation of the commodity, would be the rate in the tariff filed by the Interstate Commerce Commission, and not that rate.

Justice STEPHENS. We are agreed that these exhibits should be excluded at the present time, subject to the right of the Government to re-offer them if further connecting evidence can be produced—and it is so ruled.

Mr. Steffen. We have no more exhibits at the moment, to offer, and we are prepared to put on our first witness.

I might suggest, as long as it is within ten minutes of recess time, that if the Court would care to, we would be very pleased to recess now.

Justice Stephens. That is agreeable. We will recess now until a quarter of two.

647 Will the Marshal announce the recess.

(Thereupon, at 12:05 o'clock p. m., a recess was taken until 1:45 o'clock p. m. of the same day.)

648

AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice Stephens. You may proceed, gentlemen.

Mr. STEFFEN. Mr. Griswold, please.

Thereupon, FRANK J. GRISWOLD, appearing as a witness for and on behalf of the United States, having been first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. STEFFEN.

Q. Mr. Griswold, will you state your full name for the record, please?

A. Frank J. Griswohl.

Q. Where do you reside, Mr. Griswold?

A. Port Clinton, Ohio. Q. How long have you been in Port Clinton, Mr. Griswold?

A. Since 1906. Q. Were you connected with the gypsum industry at any time?

A. Yes, sir. Q. During what period?

A. Well, directly connected with the manufacturing end of the industry from 1906 to 1929.

Q. And with what company?

A. The American Gypsum Company of Port Clinton, Ohio.

Q. What was your capacity with the company?

A. For the first year or possibly year and a half, I was simply the superintendent of the plant that was being constructed.

Q. That would be in 1906 and 1907?

Yes. And after that I was elected Vice President and General Manager of the company.

Q. And what was the date that you left the company, do vou remember?

A. February 1, 1929.

Q. And what was your capacity when you left, what was your title or office when you left?

A. Vice President and General Manager.

Q. Prior to 1906, Mr. Griswold, what was your business?

A. I was in the machinery business.

Q. For what years?

A. From approximately 1891 until 1906.

Q. And what type of machinery?

A. Well, the manufacture of brick and tile machinery, clayworking machinery, power plants, and among other things gypsum machinery for the manufacturing of gypsum wall plaster.

Q. Did you have to do with the sale of the machinery to

the gypsum companies?

A. Yes, sir.

Q. And how widely did you travel in making your sales?

A. For the machinery company?

Q. Correct.

A. Well, I went pretty much all over the United States.

Q. Could you name any of the gypsum companies with whom you dealt during this period?

A. You mean that I sold machinery to?

Q. Yes

A. Well, first, the United States Gypsum Company, who were the successors to the Mineral Plaster, Company of Fort Dodge; the Fort Dodge Plaster Company; the Waterloo Plaster Company; the Cardiff Gypsum Plaster Company; I sold some to Emil Durr of Milwaukee; and the Niagara Gypsum Company; the Plymouth Gypsum Company; the Empire Gypsum Company; the Pittsburgh Plate Glass Company; Atlantic Gypsum Company; I don't think I ever sold the National Gypsum Company anything.

Q. How about the Universal Gypsum Company?

A. The Universal was formed after I left the machinery business.

Q. I see. Well now, what were your duties as an officer or general

manager of the American Gypsum Company, particularly during the period from 1925 to 1929 when you left the company?

A. Well, I had charge of operations and also had

charge of sales for the company.

Q. And could you tell us what your sales territory for the Gypsum Company was?

A. Well, the territory differed on different products that we made.

On wall plaster it was rather limited, on account of the freight rates, but after we were in the plasterboard business or wallboard business, we shipped farther. The farthest west we went was Chicago, and from that we went east to the Atlantic Coast.

Q. That was on wallboard?

A. Wallboard.

Q. And your territory for plaster was over what area,

do you recall?

A. Well, we didn't go east of Buffalo, on plaster; and west, very seldom beyond Chicago, the freight rate was too high. Once in a while we would get in on some special job.

Q. What other products did your company make?

A. In addition to wallboard; stucco, calcine plaster, molding plaster—that was practically all.

Q. Did you make any tile or block?

A. We made gypsum blocks, and we also made roof tile at one time.

Q. As sales manager, did you have contact or have occasion to call upon various members of the gypsum

652 industry during these years?

A. Yes.

Q. And did you call on some of the customers that you had formerly dealt with in the machinery business?

A. Yes

Q. Could you describe your relations with the different members of the industry, as to whether they were friendly or unfriendly?

Mr. BROMLEY. I object to that as calling for a conclusion, and therefore incompetent.

Justice STEPHENS. I think that is not objectionably conclusional. It describes the relationship of the parties. Overruled.

By Mr. STEFFEN.

Q. Could you state whether your relationships with various people in the industry were friendly or unfriendly?

A. They were friendly, with most of them.

Q. Did you know the officers of the United States Gypsum Company?

A. Well, I knew some of them, possibly not all of them.

Q. Who was President of the United States Gypsum Company?

A. During what period?

» Q. During 1925 to 1929.

A. My recollection is that it was Mr. Sewell 653 Avery that was President.

Q. Did you know Mr. Sewell Avery?

A. Yes, I had known him for some time before that.

Q. For how long, Mr. Griswold?

A. Well, I would say 10 years, possibly longer, I don't remember now.

Q. Were your relations with Mr. Avery friendly?

A. Most of the time.

Q. Now who did you know, if anyone, with the National Gypsum Company?

A. I knew Mr. Haggerty, who was the President of it.

Q. That is, during this period from 1925 to 1929?

A. Well, he died between that period, I think, but in 1925 he was the President, as I remember, of the National Gypsum Company.

Q. Who, if anyone, did you know with the Niagara Gyp-

sum Company?

A. Mr. M. A. Reeb, the President.

Q. Who did you know, if anyone, with the Universal Gypsum Company, during this period?

A. William Shearer, who was the President of the Uni-

versal, as I remember it.

Q. And did you know anyone with the Atlantic Gypsum

Company during this period?

A. I don't believe that the Atlantic Gypsum Com-654 pany was formed until 1925 or somewhere along there, but after it was formed, Mr. Fuller was Secretary of the company; and Mr. Channing, I don't know whether he was an officer of the company, but he was the attorney for the company. And they were the only two that I knew personally.

Q. Did you know anyone connected with the Universal

Company other than Mr. Shearer?

A. I can't recall anyone.

Q. Do you remember anyone by the name of Mr. Eugene Holland?

A. Well, that was after the Universal Gypsum Company went in receivership, and he was the Receiver for the Universal Gypsum Company. I knew him slightly, I hadn't met him but a few times.

Q. Did you know anyone connected with the Ebsary

Gypsum Company?

A. I did, Fred Ebsary, who was President.

Q. Did you know Mr. George Lenci?

A. Yes.

Q. And the Beaver Products Company, did you know anyone connected with that concern?

A. The only one I recall at the present time was Mr.

Blagden.

Q. And did you know him? A. Yes, I knew him.

Q. And the Certain-teed Company, did you know anyone connected with them?

A. Yes.

Q. Who?

A. Mr. George Brown.

Q. Who was he, what was his title?
A. President of Certain-teed Products.

Q. Did you know anybody else connected with the Cer-

tain-teed Company?

A. Well, I knew the Vice President, but I can't recall his name at the present time, it is too long ago.

Q. I recognize that this goes back quite a ways.

Was your relationship with these men friendly or unfriendly.

A. Friendly.

Q. Will you tell the Court now who were the officers of the American Gypsum Company between 1925 and 1929, with respect to that period?

A. J. H. McCrady was President.

Q. Is he living? Is Mr. McCrady still alive?

A. No, he has been dead for several years.

Q. Who was the Secretary?
A. J. B. Davis, of Cleveland.

Q. Is he alive?

A. No, he is deceased.

Q. Do you know any of the other officers of the American Gypsum Company during that period?

A. Edward McCrady, the son of J. H. McCrady, was Vice President.

Q. Was there a man named Kling connected with the company?

A. Later on, not at 1925.

Q. As an officer?

A. No, he was not an officer, he was a stockholder at that time. He wasn't even a director until later than 1925.

Q. Well now, I would like to have you describe the property owned by the American Gypsum Company at its inception, and the process of mining and producing gypsum,

in general terms. It is a very broad question; if you will state how gypsum is mined or produced, that will answer.

A. Well, in this particular locality, the gypsum was underground about 44 feet, there at Port Clinton, and it covered quite an area of territory, all around in about 2 or 3 directions from the village of Port Clinton; and in order to get at it in those days, which was before the days of stripping operations like they do now with coal, we had to sink a shaft, the same as a coal shaft, a vertical shaft directly down; and from that we drove entries; and from the entries, rooms; and mined it practically the same as coal is mined.

Q. Do you know about what the capacity of the company was when it started in 1906 or 1907?

A. You mean of finished product?

Q. No, I mean raw product.

A. Well, probably between 300 and 400 tons of rock per day.

Q. And did that capacity increase?

A. Was it increased? Q. Did it increase?

A. Yes, it did.

Q. About what were you producing when you left the company, if you can recall?

A. Probably on an average of between 800 and 900 tons,

somewhere along there.

Q. Per day? A. Yes.

Q. How many acres of ground did the company have, do

you recall?

A. We originally had only 90 acres, but we kept purchasing additional ground, land that adjoined our property, until when I left we had very close to 900 acres.

Q. Could you tell the Court where else in the country

gypsum is found, and produced commercially?

A. Well, in addition to Port Clinton, Ohio, it was found at Grand Rapids, Michigan; and at Alabaster, Michigan, which were the only points that I recall in Michigan.

Going west from there, it was found in Iowa, at Fort Dodge, Iowa, and Centerville, Iowa; and west from Iowa it was found in Kansas; and west from Kansas, in Oklahoma;

some in the Indian Territory, not very much.

Let me explain that there were two kinds of gypsum, one the rock gypsum or solid form; and then there was another called gypsite. It was more like clay, soft. That was found

quite extensively in parts of Oklahoma and Kansas, and some parts of Texas, and there was gypsum rock found in Texas; also at one or two points in New Mexico, Nevada, and California.

Justice STEPHENS. There is one word I missed. Did you mention Texas?

The WITNESS, Nevada and California.

Justice Jackson. You said they found gypsum in Texas? The WITNESS. Yes, they found both gypsite and rock.

By Mr. Steffen.

Q. Now in the Eastern part of the country?

A. Going east from Fort Dodge was Grand Rapids, Michigan, and Alabaster, Michigan, as I mentioned.
Q. Were there any deposits found in New York State?
A. Oakfield, New York, and Plasterco, Virginia.

There were other points where it was found, but it was not of sufficient depth to operate a plant, or use it, it was too expensive.

659 Justice STEPHENS. You mean it was too deep?

The WITNESS. No, the vein wasn't deep enough, it was too shallow a vein, it would be too expensive to operate it.

By Mr. STEFFEN.

Q. I show you a piece of rock, and ask you if you can

tell what it is, Mr. Griswold?

A. Well, I would say that that was a sample of gypsum rock, it is pretty hard to tell where it is from, from what locality, because it is all very much alike.

Mr. Steffen. Would the Court care to inspect this?

Justice Jackson. Yes.

(Gypsum sample handed to the Court.)

By Mr. STEFFEN.

Q. Now will you tell the Court, Mr. Griswold-

Justice Stephens (interposing). Do you want to offer this in evidence?

Mr. Steffen. We will mark it later, if we may.

Justice Stephens. All right.

By Mr. STEFFEN.

Q. Will you tell the Court what the process is after gypsum rock is brought up from the mine?

A. Well, after it was mined, most of it was in lump form, and it would be broken down to the size that a man could handle. We didn't want any pieces larger than that in

those days, than what one man could lift. It was put in mine cars and originally it was brought to the foot

of the vertical shaft and the cars were hoisted to the surface, and then dumped into a bin, and it went through a crusher which reduced it to smaller sizes.

Q. Then what was the next step in treating it?

A. Well, we kept on reducing it down, and finally put it through grinding machines which reduced it to a very fine-ground material, usually most of us tried to get it probably 85 to 90 percent through a hundred-mesh screen.

That was then the ground, raw gypsum, and it was after-

wards put through a calcining process.

Q. Will you describe briefly that calcining process?

A. Well, in those early days, in this period, it was practically all known as the kettle process. The calcining kettles were usually big steel cylinders, usually 10 feet in diameter,—once in a while they might be larger, but usually 10 feet in diameter,—and they were 8 or 10 feet deep. And they consisted of simply a circular steel shell of \% flanged steel; and the process in using them was to set them on a cast iron bottom, in those days, with a furnace underneath for the fire, and the fire came up around the shell and through usually 2 tubes, 8 to 14 inches in diameter.

The application of the heat was kept up until the temperature usually, on what was known in those days as

first settle, was around 325 degrees Fahrenheit.

This material boiled after the heat got through it, it boiled up just like water, and at that temperature it settles down.

Justice STEPHENS. Did you put the raw rock into these kettles?

The WITNESS. There was about 21 percent of water, enough to keep it boiling, and we tried to evaporate all but about 5 percent at that temperature, there was 5 or 6 percent of moisture. It settled down, and that was the point at which it was discharged into the pits.

It was then calcined gypsum or stucco, as we call it.

By Mr. STEFFEN.

Q. It this the same as plaster of paris?

A. Yes.

Q. Now that product, stucco or calcined gypsum, what did you do with it?

A. Well, that was the finished product from which all the other products that we made were made, that was the base from which we started. We made wall plaster, gypsum block and molding and casting plasters, and later on plasterboard and wallboard.

Q. All from that calcined gypsum base?

A. All from that base, yes.

Justice Garrett. May I ask what is meant by gypsum block in the trade?

662 The WITNESS. Gypsum block is a block that is pre-cast in a form, or mold, and they are usually 12 inches high and 30 inches long, and some of them are only 2 inches thick up to 6 inches thick, usually that is the limit.

It is used for partition blocks in building, for interior work, not exterior.

By Mr. STEFFEN.

Q. When did your company start making block, Mr. Griswold, if you remember?

A. Well, I can not say without something to refresh my memory, it has been too long ago.

Q. But you originally made plaster, as I understood your testimony, and then added these others?

A. Yes.

Q. And do you recall what you took up next, what product you manufactured next?

A. What?
Q. Do you recall what product you manufactured next

after having manufactured plaster?

A. Well, they started the plant to manufacture calcined gypsum or stucco; we later on began the manufacture of prepared plasters just as you see in bags all over the country; and later on we added a department where we added the sand to it right at the plant and shipped it to a man

all ready to mix water with it, and the different products as we grew along, and the last one to add,

as I remember, was the wallboard.

Q. Now describe your sales organization, Mr. Griswold. You were in charge of sales?

A. Yes.

Q. Describe your sales organization? A. We had salesmen for certain territories, the territories were divided up, and we had a man in each territory who represented the sales for the company.

Q. Did you have any warehouses throughout the country? A. Not that you would term strictly a warehouse. We

had a plant at Cleveland, Ohio, and also one at Detroit,

mixing plants we called them.
Q. What does that mean?
A. That was a place where we shipped calcined gypsum or stucco, and then put it through the mixing process and added sand there.

Of course, we had warehouses there, and we did carry small stocks of some of these other products that we could

deliver.

Q. Did you sell your product through jobbers, or through

salesmen only?

A. Well, most of it was through salesmen, but we had a few jobbers.

Q. And they handled your entire line, your jobbers?

A. No, not always.

- Q. Could you name any of the jobbers that you had at about the time you left the company in 664 1929?
- A. The Fairmont Wall Plaster Company of Fairmont, West Virginia, and the W. B. Abbey Company, of Newark, New Jersey, were the two principal jobbers we had.

Q. That is A-b-b-e-y, the Abbey Company?

A. Yes.
Q. Did you have any jobbers in the Cleveland area?

A. No, we sold our goods direct there, we had no jobbers. Q. Well now, when did your company commence mak-

ing wallboard or gypsum lath or any of the board products?

A. Our first start was to make a plant to make plasterboard, as we call it, which means the small size board, 16 x 32 and 32 x 48, known as plasterboard. We started to manufacture those first, and that plant, as I remember it now, was built in 1919.

Q. And you got into operation in 1919 or 1920?

A. I think it began operation in 1919. That is a good

ways back to remember details.

Q. And the first product that you started to make, or the first board you started to make, was what you called plasterboard?

A. Plasterboard.

Q. And would you describe to the Court what plaster-

board is, as you understood it?

665 A. Well, plasterboard was made in the early days by hand, by simply taking one piece of paper like that (indicating) and covering it with a mixture of this gypsum sludge to about the consistency of thick cream, and another sheet of paper was laid on top of it like that (indicating), and then they were put through under a roller or a press that pressed it down to the thickness wanted. The thicknesses in those days were usually either a quarter of

an inch or 3/8.

After it left there—you had to leave it there long enough for it to set, as we called it, this gypsum,—the peculiar thing about it is that after it goes through this calcining process and the water is driven out, when you add water to it it rehydrates and takes the water up and goes back into rock formation again—and this material that we made there at Port Clinton usually took about 12 minutes to set. It had to remain there long enough in order to set or get stiff enough so we could handle the board.

Then they were taken and put on cars and put through a drier and dried out by whatever process we used. We usually ran it under a shed, and in the early days it dried

naturally by the air alone.

Q. About how long would that take, Mr. Griswold?

A. Well, if they had to depend on atmospheric conditions, they sometimes might dry in a day or two, or sometimes in a week, depending on the moisture.

Justice STEPHENS. How did you keep it flat, pour it out on a flat surface and lay something flat over it?

The WITNESS. Some people used a press in the first days, and others a roller. What we used was a traveling belt, a very short one as I remember it—the first one was only possibly about 75 or 80 feet long, and 34 or 36 inches wide. This belt traveled along like a belt conveyor, and at one end of it, here, this sludge or mixture was put on; the top of this belt was covered with a paper that traveled right along with it; as this sludge was put on there it was spread out over the surface by some process, or a roller, and another roller right above it, there was another roll of paper came around, and that roller pressed this material down to the thickness you wanted this, and pressed the top paper down, and the whole mass, to make it either a ¼ inch, 5/16 or 3/8, or whatever you wanted.

The material kept on traveling down, and it had to set

in those days before we could cut it off.

After it got down here-

Justice Jackson (interposing). Did you have to stop the movement of your belt to do that?

The WITNESS. We did in the early days. We had a traveling cutter, a knife came down or perforator, what-

ever it was, and it traveled right with the belt and cut them in any lengths we wanted, usually 48 inches.

Now in those days this edge of the board was very rough, a very rough proposition, and there was a lot of waste attached to it; and we had to, later in the process, trim the edges of the board, that all had to be thrown away. So when we got through with our sawing the edge was square, but on this edge it was trimmed and on this edge it was trimmed, and all four edges were raw.

Justice STEPHENS. The record may show that the witness indicates that the top and bottom surfaces were flat, but the two edges were rough; is that right?

Mr. STEFFEN. All four edges.

The WITNESS. The board was originally made wider than 32 inches, but it was trimmed down to 32 inches, and then cut off to whatever length we wanted, usually 32 or 48, and that left a raw edge where it was cut off, and also these trimmed edges, so all four edges were raw edges.

By Mr. STEFFEN.

Q. Would you describe a little what this gypsum slurry or sludge is, the composition of it as you put it on this moving belt, in the beginning in 1920, and whatever changes were made?

A. Well, as I remember now, at the beginning we didn't add much of anything to it except possibly some sawdust, but—well, we did add material to hasten the set, what we

called an accelerator. The trouble was that we didn't want to wait, to stop the belt for it to set, we wanted

it to set by the time it got down there so as to increase our capacity. The faster that material set, the more board we could make. So the accelerator and the sawdust, I think, were the only things we used, to start.

Q. And do you recall about how much sawdust, or could

you give any idea of the amount?

A. I don't remember the amount.

Q. But you used, you say, sawdust from the beginning? A. Yes.

Q. What was the purpose of the sawdust?

A. Well, we figured it helped absorb the moisture in there, for one thing, and had a tendency to possibly make the board a little lighter.

Q. Would it have any effect upon the nailing qualities or

sawing qualities of the board?

A. Well, the amount of sawdust we used, I don't think would affect it very materially, we never used a great amount of it.

Q. Could you give the Court an idea of how much the

sawdust tended to lighten the board?

A. Well, of course, that would depend upon the amount, and we used such a limited amount that I don't think it would lighten it but a very few pounds.

Q. How heavy was the board you were making in

1920 and 1921? 669

A. As I remember it, it ranged from 2,000 to 2,100 pounds per thousand square feet, that is a 3/8 board.

. Q. Was that weight, to your knowledge, similar to the weight of board made by other companies, if you know?

A. Well, at the time we started this plant, this wallboard plant, in 1925, where we made wide board—that is what I was talking about now-I don't think there were very many people manufacturing board that ran much lighter than that, there might have been but I don't remember now.

Q. Well now, was there any board made during this period, say 1919 and 1920, that had a different type of edge than the one that you have described here, which had

to be pared off?

Between 1919 and 1920?

Q. Yes, at about the time you started your plant. A. Yes.

Q. Will you describe that?

A. Well, the United States Gypsum Company were making a wallboard or plasterboard, at that time, in which the edges were completely covered, and the Best Wall Company were manufacturing a wallboard that had covered edges.

Q. Did you consider making a board with a covered edge

when you started your plant in 1920, or thereabouts?

A. Well, we might have considered it, but we Q. Did you make any effort to make a covered-670 didn't do it.

A. Well, I really wanted to make a covered-edge board, because I recognized the advantages of it, and always felt that that was the board to make.

Q. What effort did you make, if any, to make such a

board?

A. Well, at that time I knew of the litigation going on. between the United States Gypsum Company and the Best Wall Board Company, and having heard more or less about it as I traveled around all over the country, I wasn't particularly anxious to get mixed up in any litigation if I could help it.

So as I remember it, I called on Mr. Avery to discuss with him the possibility of securing a license, whether he would be willing to issue a license to us to make the same type of board that they were doing, with a covered-type edge.

Q. You mean Mr. Sewell Avery, President of the United

States Gypsum Company?

A. Yes.

Mr. Bromley. Could we have the date of that fixed, please.

By Mr. Steffen.

Q. Could you state about when this was that you called on Mr. Avery?

A. No, I could not.

Q. Could you fix it with relation to the time when you started operations at your plant there?

A. It was prior to the time we started operation of the plant, as I remember it, the old, original plasterboard plant.

Q. And how long prior, one year or a few months, or

could you say?

A. Well, I would say possibly 6 months, when we were considering going into the proposition.

Q. When you were arranging your plant? A. Yes.

Q. Well, tell us what Mr. Avery said-

Justice Stephens (interposing). Can you fix the place of the conversation, so as to identify it a little more?

By Mr. STEFFEN.

Q. Could you tell us where you saw Mr. Avery?

A. No, I don't remember where it was that I met him at this time.

Q. Where are the offices of the United States Gypsum Company, if you know?

A. At that time they were in Chicago.

You are not sure whether you went to Chicago or whether you saw Mr. Avery somewhere else?

A. I could not say at this time.

Q. Well, what transpired, at your meeting with

Mr. Avery?

A. Well, as I remember it, Mr. Avery told me about the litigation that he had with the Best Wall Board Company, and as I remember it there was some talk about the amount of the claim that he had against them.

.Q. Did he mention the royalty figure that he was claim-

ing in his suit?

A. The royalty or damages, whatever he called it, I didn't pay much attention to that. But when it came down to granting a royalty to my company, or rather a license to the American Gypsum Company, to permit it to make the same type edge, he figured that he would have to charge us, of course, the same price he was claiming in his suit from the other people; and that price, when reduced to the cost per thousand square feet, was prohibitive. So we couldn't see it, or I couldn't see it.

Q. And did you take out a license with the United States

Gypsum Company?

A. No, I never took out one.

Q. Do you recall what the price of gypsum board was,

f.o.b. mills, at this time, or plasterboard?

A. I am quite sure it was \$30 a thousand for wallboard, a thousand square feet, and gypsum lath always sold for a much lesser price, probably 15 or 16 dollars a thousand, or somewhere along there.

Q. And could you give the Court an idea of how much the royalty would be that Mr. Avery suggested, if he suggested a figure at all?

A. Well, as I remember it—I wouldn't say this is correct—my recollection is that it would figure around about \$8 a thousand feet on wallboard.

That would be prohibitive, you thought?

A. Well, it seemed that way to me.

Q. Did you attempt to make a type of closed-edge board when you started your plant?

A. No, not a closed-edge board.

Q. What sort of an edge did you put on your board?

A. Well, at the first start, when we started the manufacturing process, we manufactured the plasterboard with an open-edge type board. But we soon discovered that there were many people that preferred the closed-edge type of board that was being made by the Gypsum Company—I guess the Gypsum Company was the only company making it at that time. So we began to figure ways and means of making something to compete with their closed-edge board, and wound up with what was known afterwards as the Clark patent and the Birdsey patent, which were both claimed to be in conflict with each other.

Q. Who was Clark?

A. Clark was the superintendent that I had at the American Gypsum Company wallboard plant.

674 Q. When did he come with you?

A. I would say in the beginning of the construction of the plant, about 1919, as I remember it.

Q. Do you recall when he filed an application for a patent on the closed-edge or partially closed-edge board?

A. No, I do not remember the date. Q. Was it sometime in 1920?

A. When we filed the application?
Q. When the Clark application was filed.

I think the records will show that it was in the early part of 1920.

A. Well, it probably was, I couldn't give the exact date of it, but I would say it was probably in 1920.

Mr. BROMLEY. I will concede, if the Court pleases, that the date that Clark filed his application was July 31, 1920.

Justice STEPHENS. Thank you.

Mr. STEFFEN. And the date when Birdsey filed his application was what?

Mr. Bromley. January 2, 1920.

Mr. STEFFEN. That is, filed his application?

Mr. BROMLEY. Yes, sir.

Mr. STEFFEN. Would you stipulate also as to the date when his patent was issued?

Mr. BROMLEY. The Birdsey patent, 1,358,508, issued November 9, 1920.

## By Mr. STEFFEN.

Q. When Mr. Clark filed his application, did he know of the Birdsey application, or the Birdsey patent? A. I did not.

Q. Did Mr. Clark know?

Mr. BROMLEY. If he knows.

By Mr. STEFFEN.

Q. If you know. A. He did not know, to my knowledge.

Q. Now will you describe just briefly the type of edge that was claimed under the Clark patent, and which you started production of?

Justice Stephens. Was the Clark patent issued?

Mr. Steffen. Was the Clark patent ever issued?

The WITNESS. Yes.

Justice Stephens. I understood you to stipulate on the Birdsey patent, but there was no stipulation with regard

to the Clark patent. I assumed perhaps it didn't issue. Did it issue?

Mr. STEFFEN. I think not.

Mr. Bromley. No, it did not issue, because on May 10, 1921, an interference was instituted, and Birdsey was awarded priority many years later, in 1926.

Mr. STEFFEN. I meant application, not patent.

676 By Mr. Steffen.

Q. Will you describe the type of board that you manufactured according to the application filed by Clark?

Justice Stephens. I didn't mean to be super-technical about your wording, but we don't want to get into the record that there was a Clark patent unless there was one.

The WITNESS. I have already described the process of

making it on a belt, a traveling belt.

Now this improvement consisted of the edges, both edges of the board, and the paper on the board, the lower one was crimped and turned in like that; and the top one, when it came around, it was also crimped in; so that when they came under the rolls, the slurry of the gypsum squeezed out in here, and the roller pressed it down and cemented the two edges together, leaving a gypsum core exposed here, the paper did not cover the entire edge. But it did have four thicknesses of paper when we went to nail through it, or anything. There was this edge that was doubled under, and also the lower edge that was folded up, and the nail went through there, and it had four thicknesses of paper. And we called it a four-ply edge.

But it was not wholly covered, the gypsum core showed

part way.

Justice Jackson. But the paper covered a portion of the edge, did it?

The WITNESS. Only, as a rule, just the thickness where it doubled down. It might be that the slurry might, during the pressure, squeeze up under that a little but, but there was always a substantial amount of gypsum that showed through the center.

By Mr. STEFFEN.

Q. Now I would like to ask you, if you know, what the Utzman closed-edge process looked like?

Justice STEPHENS. I am not sure that this is important, but I don't understand how there would be four thicknesses of paper.

The WITNESS. This is the bottom paper, lying on the belt, on which the edge had been turned over like that. Then here comes the top paper, coming down from the roll, and coming in like that. The roll presses them down to the 3/8 thickness, or whatever thickness it was, this slurry holding it apart—

Justice STEPHENS (interposing). The exterior edge is exposed?

The WITNESS. Yes, that was probably folded under at least a half an inch.

Justice STEPHENS. It wasn't folded over the edge?

The WITNESS. No.

Justice STEPHENS. The edge itself was exposed?

The WITNESS. Yes.

Justice Stephens. The paper was pressed down just coincidental with the edge?

678 The WITNESS. Yes.

By Mr. STEFFEN...

Q. Now will you describe to the Court what the Utzman edge was?

A. Well, you are asking me some questions that I am liable to get mixed up myself on, this has been so long ago.

Justice STEPHENS. Take your time; and if you get tired, we would be glad to give you a little recess from time to time.

The WITNESS. The Utzman-type edge, as it was called, was made by the same process, the same traveling process, but the paper that came through, the bottom paper was scored, as they called it, with a device that ran along here, that creased it there, and also if we wanted a % board it was creased/up there so as to be % of an inch thick.

Then the top paper that came tough the same way, came through under there, and was pressed down, but it didn't come quite over to the edge of this, as I remember it, but the people that made that type of board usually applied some kind of a paste on the paper that cemented the top paper down onto this lower paper; and when it was finished you had a completely covered edge, the gypsum sludge was sealed in there and could not get out, it was a completely covered edge; and that was known as the Utzman patent.

Mr. STEFFEN. I show you a piece of board here, furnished by defendants, and ask if you can identify that as an Utzman edge?

Justice STEPHENS. Before you answer that question-

Mr. STEFFEN (interposing). It should be marked as an exhibit?

Justice STEPHENS. I was about to say, Mr. Steffen, that if it is really critical that the record show how these edges are made, it won't show it now, because of the informal use of this paper as an illustration. Have you any exhibits or descriptions or drawings which could be introduced to show it later?

Mr. STEFFEN. As a matter of fact, in the Complaint the Utzman patent is set out, and the design.

Justice STEPHENS. I thought so.

Mr. Steffen. I simply wanted to more or less informally introduce the subject.

Justice STEPHENS. Very well.

Mr. BROMLEY. You haven't got the right edge, you handed him a round edge. Here is the Utzman edge.

Justice Stephens. Read the last question.
(The pending question was read by the reporter.)

By Mr. STEFFEN.

Q. Mr. Griswold, that I have shown you has been marked Government's Exhibit No. 43 for Identification, and I ask you if you can identify that as substantially the

680 Utzman\_type edge?

A. Well, this is not like they originally used to make it, this is a rounded edge. The original Utzman edge used to have a pretty square edge, at least they tried to get it square.

Q. I show you Government's Exhibit 44 for Identification, and ask you if you can identify that as to the type of

Utzman edge that was being made in 1920?

A. This is the type that the Utzman edge was at that time, or practically so, as I remember it. It is a completely closed edge, the way I remember the Utzman-type edge was made.

Mr. STEFFEN. Does the Court care to look at these edges?

Justice Jackson. Certainly. Have both of these been offered, Mr. Steffen?

Mr. Steffen. They haven't been offered yet.

Justice Garrett. May I ask here, one edge of both of these exhibits is covered. The other edges are exposed. I have been under the impression that in that Utzman patent all the edges were covered. Is this just a——

Mr. Steffen (interposing). I can testify that that is just a sample, or I think Mr. Griswold could testify to that better.

The WITNESS. What you see there is only a piece of a board. That covered edge ran continuously along on a belt that was probably 200 feet long.

Justice STEPHENS. In other words, those are small samples cut out of a larger board?

The WITNESS. Yes.

Justice Stephens. And in a board itself, all edges are covered?

The WITNESS. Both of them, this side and that side (indicating); but where they are cut off, that cut through paper.

Justice STEPHENS. They would not be covered?

The WITNESS. No, if a board was 10 feet long, that edge would be raw; and the next 10-foot cut would be raw; but the edges would be completely covered.

Justice STEPHENS. Do you want to offer these in evidence?

Mr. STEFFEN. They are for Identification I would rather not offer them for the moment.

Justice STEPHENS. Very well.

Mr. Marshal, put these in the possession of counsel for the Government.

By Mr. STEFFEN.

Q. Mr. Griswold, I understand from your statements that the Birdsey and the Clark patents were in interference in the Patent Office beginning somewhere around 1920?

A. Yes, about that date. I couldn't give the exact dates.

Q. Do you know about how long that interference proceeding continued?

A. I couldn't say the exact date, but I would say around five years, anyway, before the final decision was made.

Q. I think that is correct, it was around February, 1926. And what was the outcome of the interference proceeding?

A. Very unsatisfactory to me. Priority was given to Birdsey, and the interference suit that was started was finally decided in favor of United States Gypsum Company.

Q. But who was Birdsey?

A. Birdsey was connected with the United States Gypsum Company, I don't. remember his capacity, in just what capacity he was connected but he was connected with them.

Q. Was the patent, to your knowledge, owned by Birdsey

or by the United States Gypsum Company?

A. Well, they were taken out by Birdsey, but of course assigned to the United States Gypsum Company. They

owned it, as I understood it.

Q. And during this period from 1920, when you started your plant, to 1926, you manufactured, as I understand your testimony, a board according to the terms of the Clark application, is that correct?

A. Well, originally, when we first started, we made an open-edge board, but later on we started to make that

Clark patent, the four-ply edge, as we called it, and continued that until such time as we were stopped by the decision of the Court.

Q. Well, was there ever a notice given to you by United States Gypsum that you were infringing either the Birdsey

or the Utzman patents?

A. Well, I think there was, I know there was on the Birdsey patent. I am not sure about the Utzman patent because that case never went into the courts, as I remember it. The Birdsey patent, they served us a notice on.

Q. Do you remember about what date that was?

A. Well, I would say approximately the latter part of 1924 or in 1925, but that is not definite, that is as near

as I can place it.

Q. I show you what has been marked Government's Exhibit No. 101 for identification, which purports to be a letter from Arthur A. Olson, addressed to the American Gypsum Company, under date of August 18, 1925. Does that refresh your recollection, Mr. Griswold, as to the date?

A. Yes, sir.

Q. And on what date would you say you received this notice?

A. This letter was written on the 18th of August, and was replied to, on the 22nd of August 1925.

Q. How can you tell that?

A. By the stamp on it, showing the date it was received and the date it was answered.

Q. Did you send the answer?

A Yes. This is signed with my initials. I dictated the letter.

Q. What patents are listed on that notice?

A. The two Utzman patents and one patent issued to C. R. Birdsev.

Q. That is the Birdsey that you have been speaking of?

A. Yes.

Mr. Steffen. We offer Government's Exhibit No. 101 in evidence.

Mr. BROMLEY. No objection.

Justice STEPHENS. Is this the notice which appears at the top of the file which the Government has just furnished us?

Mr. STEFFEN. That is right.

Mr. KNUFF. On the bottom of the copy that is furnished to Your Honor, on the right lower corner, you will find "D-1." D-1 is the number that the witness now has in his hand.

Justice STEPHENS. And it is now offered as Exhibit 101?

Mr. Steffen. Yes, it is offered as Government's Exhibit 101.

Mr. Johnston. If the Court please, I want to make a further observation in regard to these exhibits. Here is an exhibit that hasn't anything to do with my client

we have had an opportunity to look at it. These exhibits this morning, particularly those offered as the tariffs, which were excluded for the moment—but there is typical of what I want to bring to the attention of the Court—they consisted of several hundred pages, and they offered and passed down the line here, and at best we could only have a few moments to see what they contained. First, we don't know whether there is authenticity to them. It appeared very apparent this morning that those tariffs were not authentic, they were copies with penciled notes on them. Now, we couldn't make an examination to determine that for the purpose of offering an objection. Secondly, as to those, and particularly now as to this exhibit, I cannot

see where there is any materiality in the case as to Texas, and I am just wondering now, in view of what I had understood the Court to say earlier in the day, that if we did not object it would be taken then as introduced and effective against us if it was material at all—now I am hoping there can be some way worked out here to facilitate this thing. I don't want to be in the position of objecting to every exhibit that comes in.

I am going to be obliged, I fear, unless I can have reasonable opportunity to know beforehand what they are going to offer, to do so: I just make that as an observation, I am

doing it on my own authority, and not speaking for any other defendant, but I think the other defendants are similarly situated.

Justice STEPHENS. Well, Mr. Johnston, as the Court indicated this morning, it intends of course that the defendants' counsel shall have an opportunity to inspect these exhibits. I adopted your suggestion and Government counsel agreed to submit them to you as soon as they can arrange to do so outside of the session of the Court, so you may have an opportunity to examine them at leisure.

I don't quite understand why you are reiterating it,

I thought that was the understanding.

Mr. Johnston. My point in bringing it up now is, that I asked counsel if they would be able to furnish us copies, and they said they would not, that there was only a limited number of copies, and they were only going to furnish one copy to all the defendants, and that would be at the time they made the offer. I submit that that is not very satisfactory.

Mr. Steffen. I would say in that connection that the next 100 exhibits that we are going to discuss were all photostated and defense counsel have already been furnished with one set of photostatic copies when Mr. Griswold's deposition was taken out in Port Clinton, which would seem to me to be more than adequate for the occasion. They have had them for six months.

Justice STEPHENS. Do you mean that this set of photostats which was furnished to the Court has also been furnished to the defendants?

Mr. STEFFEN. Yes.

Justice STEPHENS. Each one of counsel?

Mr. ADAMS. I never received a copy of them.

Mr. JOHNSTON. I got a copy of the Griswold deposition, but I did not get a copy of the exhibits, and I have been unable to see a copy of those exhibits until this one was passed down the table, and I asked counsel for the Government, and they said they could not furnish them.

Mr. STEFFEN. At Port Clinton, I might say, we argued for a matter of fifteen or twenty minutes to see if we couldn't get the reporter to put those exhibits in the minutes. Everybody, Mr. Adams included, said that that was preposterous, to have them put in the minutes. The best we could do there was to give them one set of photostatic copies. They can make as many reproductions as they want to, from that, and they have had six months to do so. We are glad to cooperate in any way that we can, but, after all, one set to the defendants six months ago, and another set given to them today, and all the time in the world to examine them, seems to me to be sufficient.

Mr. Adams. May I be heard on this, Your Honor? Justice Stephens. Yes, Mr. Adams.

Mr. Adams. The question of whether or not we were going to set these exhibits out, some 120 exhibits, in full, in the course of typing the deposition, was something that I protested against, and I think I am right; I think I was right then. It cost several hundred dollars, and perhaps a lot more than that, to go out to Port Clinton and take this deposition which is not even being used today. And I protested against the expense involved.

Secondly, I questioned the propriety of it, which I still do. I never heard of such a proceeding before. I never got a single one of the exhibits to that deposition that the Government introduced out there. Now, they say that they furnished a set to defense counsel. There are some seven or eight defendants here, located in different cities, having different clients. I know that counsel for U.S.G. did get a copy of those exhibits, one copy. The only reason that I had any information as to what was in them at all was because I took the trouble to go to their office and read them. But I agree with Mr. Johnston here, that this is a most unsatisfactory situation because none of us want to take the time of this Court to have to object to every single exhibit as it comes along, but it seems to me that unless we do that, we are going to possibly be waiving some rights for our clients.

I think if we could work out some system to get along with this a little quicker, it would be very much more helpful.

Justice Stephens. The Court will be in recess

689 informally for a few moments.

(At this point a short recess was taken, after which the proceedings were resumed.)

Justice STEPHENS. Gentlemen, this matter of exhibits, and the right to inspect them, presents a problem of one absolute right, and some conflicting conveniences. There isn't any question at all but what the defendants, and each of the defendants, have a right to see the original or a correct copy of the original, for a sufficient length of time to inform himself as to the contents thereof, so that he can determine whether or not to take an objection or not.

Now, on the other hand, I don't know that the Government is under any absolute duty to furnish copies to the defendants, but if the Government does not do so, the Court has got to sit here and wait for minutes or hours or days, when it accumulates, while the defendants take time to

inspect these exhibits.

So that it is a question of time and expense, whichever way you look at it. If the Government furnishes photostatic copies in sufficient number so that each of the defendants can have a reasonable opportunity to see these exhibits, outside of court hours, that will cost the Government some expense to get those photostats made. If the Government does not do that, it is going to cost, not the

Department of Justice, but the Government as a whole, a great deal of expense to have three judges sitting here, and all the court attaches, for much more time than they would otherwise sit, because of the necessity of having these exhibits examined in the court-room, or taking recesses so that the defendants can examine them. Consequently, we strongly urge upon the Government that it have photostatic copies of all these documentary exhibits stricken off in the Department of Justice Photostatic Bureau, which was operating when I was, some years ago, connected with the Department.

We, as judges, will cooperate in this by letting these copies be used by the defendants. There are three here, so far as this set is concerned. We don't want to be selfish about our use of them, and we will do everything we can to accommodate counsel on both sides. But we express the very strong hope that the Government will be able to aid

the Court, and the progress of the case, by making additional photostats available. We are thoroughly agreed that one photostatic copy of these exhibits for six or eight or twelve defendants is not enough. Each defendant has an absolute right to see what is introduced against him, and to see it long enough to know what is in it, and examine it and consider it.

What can you do, gentlemen, as to that?

Mr. STEFFEN. We can investigate and find out what we can do. I can say that this is wartime and that 691 photostatic paper and photostating is very difficult to get done. As a matter of time and of expense, it will be very difficult. We will be very glad to cooperate in any way we can, however, to facilitate the trial.

Justice STEPHENS. There is one other alternative which is not a desirable alternative, in view of the fact that witnesses are here from abroad, and that is that we shall adjourn for several days while a set of exhibits is furnished, a set of proposed originals is furnished to the defendants, so that they can examine them. But that again prolongs the trial and causes expense to all concerned, of hotels and witnesses and all that sort of difficulty.

So I think the best way out of it, if you can possibly arrange it, gentlemen, is to see if you cannot get photostats and get them promptly. You can tell, perhaps, by tomorrow morning, after consulting with the Department, how far you can go in the direction of furnishing addi-

tional photostats, can you not, Mr. Steffen?

Mr. STEFFEN. Mr. Knuff suggests that we can give, right at the present time, one copy of the photostats which they can use at the table, and return to us at the close of the day. That will give them complete opportunity to inspect them.

May I make one other brief statement? Much of this is a tempest in a teapot, to use Your Honor's language, because many of these defendants don't know any-

thing about some of these exhibits.

The Texas company doesn't know anything about whether the American Gypsum Company held a meeting or not, and they are offered, and if they are admitted by the American Gypsum Company, or if they are a United States Gypsum Company exhibit, and they are admitted by the United States Gypsum Company, while all the other defendants are certainly entitled to inspect them, actually they won't

know any more after they have inspected them than they did before.

Justice STEPHENS. Of course there is another problem, Mr. Steffen, so far as that is concerned. It is true, even in smaller cases, but particularly in a large and complicated case like this it is of great importance to the Court and counsel on both sides of the case, that definite rulings should be made on the admissibility of evidence at the time it is offered, except in some particular exceptions where there has to be connecting evidence supplied, and instances of that sort. Otherwise, if we take a lot of evidence in for what it is worth, and determine whom it will apply to later, nobody knows what is in the record or isn't in the record at the end of the case, and that is not satisfactory. Of course it may be, as you suggest, that some of the defendants may not know much more about the exhibits after

they have inspected them, than they do at the beginning, but nevertheless they have the right to determine the extent of their own ignorance, and not have

somebody else determine it for them.

Mr. Steffen. In this case the Celotex people, Mr. Oliver was handed all these exhibits, and they were the people who have taken over the American, and they know the American affairs as well as anybody. They have had access to a full set of the exhibits in this case.

Justice STEPHENS. What do you say to that, Mr. Oliver?

Mr. OLIVER. About a month ago I went to the Department of Justice and asked them if they would let me have a photostatic copy of the Griswold deposition exhibits, and they said they did not have a copy that they could let me have, but they loaned me a copy, from which I had a photostatic copy made, and I do have that here.

Justice STEPHENS. Then you are not in trouble over this one.

Mr. OLIVER. Not right now.

Justice Stephens. As some of the other defendants seem to be.

Mr. OLIVER. But I will be in the same boat as the others when they pass from the exhibits that were submitted at the time of the taking of the deposition of Mr. Griswold.

Justice STEPHENS. Let's see if we can make a little progress for the moment, and then Government counsel 694 will see, during the recess this evening, whether they can furnish us with further photostats. We have three here, and Mr. Oliver has one, and there was still another one furnished to one of the defendants at the time of the deposition, as I understand it, which makes five.

Mr. BROMLEY. That is not so. We did not receive any copy of those exhibits, although Mr. Steffen made that statement.

Mr. Steffen. I believe my statement was incorrect.

Justice STEPHENS. Then there are four copies. Now there are six defendants, with their associated individuals. Can't the defendants, this evening, or after court, make out sufficiently so far as these Griswold exhibits are concerned, with those four sets, so we will not have to delay any longer? Can't we go ahead with these this afternoon by identifying them and explaining what they are, and then let you gentlemen for the defendants inspect those four sets this evening, and make your objections in the morning, if you have any? That will get us that much further ahead today. Is that agreeable to all concerned?

Mr. BROMLEY. Yes, sir.

Justice STEPHENS. Let's proceed that way, then, and I will use my very best offices with the Government to get photostats of everything you can in large and sufficient quantities for the defendants, because they do have

the right to examine them, and because otherwise we are going to be here twice as long as we planned, and we are planning to stay quite a while as it is.

If the defendants want to have these copies, which we now have up here, in their possession while the examination is going forward, they may have them.

I think Government's Exhibit 101 has been offered, but not ruled on? Will you read the offer, if you can locate it, Mr. Reporter?

(The reporter read from the record as follows:)

"Mr. STEFFEN. We offer Government's Exhibit No. 101 in evidence."

Justice STEPHENS. Is there any objection to this Exhibit 101? Mr. Bromley has not objected to it. Does any defendant object to it?

Mr. O'DONNELL. Might I ask the purpose of the exhibit, what the plaintiff expects to prove by this letter?

Mr. Steffen. Just general background.

Mr. O'DONNELL. Then the Newark Plaster Company, and Mr. Tomkins, will have to object upon the ground that they had no tie-up with the wall board industry at the time this letter was written.

Justice STEPHENS. Who did not?

Mr. O'DONNELL. The Newark Plaster Company and the individual defendant Tomkins—and that objection would apply to all exhibits offered by the Government dated prior to 1939.

Justice STEPHENS. Mr. Steffen, what do you mean by "general background"?

Mr. Steffen. It corroborates the statement of the witness as to the time when this notice was received. It do n't prove in one document that all these defendants have conspired, but it certainly is relevant to establish the point that the United States Gypsum Company did notify the American Gypsum Company that it was infringing upon those three patents, and it is very material to know which patents they were giving notice upon, and very material to know that they did serve sotice, because many things transpired after that notice was received which we expect to establish in evidence.

If I may answer the point made here, I think we quoted this morning from the Interstate Circuit case, that if we proved a conspiracy, even prior to the time that any of the present defendants had anything to do with it, and they came in, knowing of that, that it is perfectly proper proof of a conspiracy. So that, so far as Newark is concerned, they are on the sidelines, they don't know anything about the thing, perhaps up until 1937 or some such time, but when they came in, then it becomes particularly relevant to them, and they cannot object to our proof of the earlier

conspiracy.

## Justice STEPHENS. Mr. Adams?

Mr. ADAMS. I simply make the general objection at this time that it is not binding on us until it is connected, and I would like to make that objection to this whole line of exhibits, without having to arise with respect to each one.

Secondly-

Justice SPEPHENS (interposing). That may be noted.

Mr. ADAMS. I just wanted to advise the Court that Mr. Finck and I can get along with one set of these exhibits here this afternoon, if it would be more convenient for the Court to have this set.

Justice STEPHENS. We would like to have one set on the

bench during the afternoon, if you don't need it.

The Court rules as follows, gentlemen, with respect to the admissibility of this exhibit. Of course it is not admissible to prove that anyone except the American Gypsum Company was given the notice which the exhibit describes, or which the exhibit embodies, but it seems to me that the objection, Mr. O'Donnell, that you make, and that perhaps Mr. Adams also makes, really goes to its weight rather than to its competency or admissibility or relevancy so far as the other defendants are concerned, even those who, like you, claim to have come into this arrang ment with the United States Gypsum Company at a much later date than this, because this case does involve a charge of conspiracy

and combination, and the Government has a right 698 to try to prove, if it can, that the arrangements which were earlier made, ultimately ripened into a general combination and conspiracy, and it has to prove

that a step at a time.

Now, I do not mean by ruling that way, that we intend to take in large and indefinite areas of so-called background evidence, but I do think that the theory, upon which this is offered, as described by Mr. Steffen and amplified by myself at the moment, is proper, and with that explanation of the Court's ruling, unless my colleagues have something to say, I will overrule the objections and the exhibit is received in evidence.

(The document referred to, marked as Government's

Exhibit No. 101, was received in evidence.)

## By Mr. STEFFEN.

Q. Mr. Griswold, can you tell the Court what, if any, action the American Gypsum Company took upon receipt of this notice from the attorneys that you were infringing the Utzman and Birdsey patents?

A. As I remember it, now, they appointed a committee, the Board of Directors did, to look into the matter. The details of that I do not remember without something to re-

fresh my recollection.

Q. When you say "they" appointed a committee, would you tell me who you mean?

699' A. The Board of Directors,

Q. Of the American Gypsum Company?

A. Yes.

Q. Were you named, do you recall, as a member of that committee, or who were the members of the committee?

A. I could not say offhand. I think I was a member of it, but I couldn't say who the others were.

Q. And do you recall the date?

A. No. I do not.

Q. I show you what has been marked as Government's Exhibit 102 for identification, which purports to be a copy of the Board of Directors' meeting of the American Gypsum Company on August 19, 1925, and ask if you can identify the signatures.

A. Yes.

Q. Take the first signature and state if you can identify that.

A. The first signature is J. H. McCrady, president.

Q. And can you identify the second signature?

A. J. B. Davis, secretary.

Q. Now, I believe you testified, did you not, that both of those men are not living?

A. Both of them are deceased.

Q. Do you have any recollection of having attended the meeting which is described in those minutes?

A. Yes, I attended the meeting because it so states here, and I have a recollection of what happened, but I couldn't say as to the date exactly.

Q. I call your attention to the last paragraph of the minutes, and ask if it correctly portrays what took place at the meeting, the last paragraph on the first page.

A. "Whereas, the American Gypsum Company has received a letter dated August 18, 1925, from Attorneys Jones, Addington, Ames, and Seibold, of Chicago, representing the United States Gypsum Company, notifying us that the plaster board which we are manufacturing and selling, and the process used by us in manufacturing it, infringe three United States Letters Patent owned by the U. S. Gypsum Company"—Do you want the rest of it?

Q. I didn't want you to read it. I asked you if that is a correct statement of what took place at the meeting,

according to your recollection.

A. I would say yes.

The said of

Mr. Steffen. We offer Government's Exhibit 102 in evidence.

Mr. BROMLEY. No objection.

Justice Stephens. Is there any objection by any of the other defendants?

It is received in evidence.

(The document referred to, marked Government's Exhibit No. 102, was received in evidence.)

701 Mr. JOHNSTON. If the Court please, I understood that we were not to raise any further objections during the day, but that we were to reserve them until tomorrow.

Justice STEPHENS. That is very true. It is received subject to the right of the defendants to make objections in the morning after an opportunity to inspect. Thank you for reminding me of that.

By Mr. STEFFEN.

Q. Now, Mr. Griswold, the minutes provide that: "Therefore, C. F. Miller moved, and H. K. Tadsen seconded, that a committee consisting of J. H. McCrady, J. B. Davis, and F. J. Griswold be appointed with full power to take such action as may be necessary to protect the interests of the American Gypsum Company."

Did that committee take any action that you can recol-

lect now?

A. Yes, I am sure they did, but I don't remember the details without something to refresh my memory.

Justice Stephens. Mr. Steffen, I think probably, in view of the fact that probably with respect to this set of exhibits the defendants haven't as yet had a chance to see them, it might be more convenient, as far as making our record is concerned, if, instead of receiving them in evidence now, they be offered now, and then tomorrow morning when

defendants have seen them, the objections and rulings all be made at one place in the record. Other-

wise they will be shown as received now, and then if there are objections made tomorrow morning, and the ruling has to be modified, the ruling on the exhibits will be in two different places in the record. So I will revoke the ruling on admitting Exhibit 101, with the right of the Government to re-offer it tomorrow morning. But you may proceed and conduct your examination, nevertheless.

Mr. STEFFEN. Does that apply to Exhibit 102 also, which has just been identified?

Justice STEPHENS. Yes, to Exhibits 101 and 102 both. That is only for the purpose of making it more convenient,

when this case reaches the stage of appeal, should either side appeal from an adverse ruling. But you need not stop your examination this afternoon. Go right ahead and examine the witness and describe all the papers you want to, and make your offers.

(The documents heretofore received in evidence as Government's Exhibits 101 and 102 were withdrawn from

evidence.)

## By Mr. STEFFEN.

Q. Well, your committee, Mr. Griswold, did it have any meetings with the United States Gypsum Company or any-

one else in regard to settling the alleged infringement claim of the United States Gypsum Company?

A. As I remember it, we had a meeting with Mr. Avery, one meeting at least, but I don't remember just when, or the details, at this time.

Q. What is your best recollection of the date or time of your meeting with Mr. Avery and the United States Gypsum Company?

A. I have no distinct recollection as to the exact date. It

Q. You do recollect, you say, that you had such a meeting?

A. I am sure we had a meeting.

Q. Do you know where it may have been held?

A. My recollection is it was at Chicago. We very seldom

met any place else, so I would say we met at Chicago.

Q. I show you Government's exhibit marked for identification No. 103, which purports to be a letter, an unsigned letter, from Mr. Griswold to Mr. J. H. McCrady, under date of May 21, 1926—no, I have offered the wrong exhibit.

First, I would like to refer to what has been marked as Government's Exhibit 104 for identification.

Justice STEPHENS. That is the letter of May 12?

Mr. Steffen. Yes, addressed by Mr. Griswold to Mr. J. H. McCrady. I will show that to Mr. Griswold and ask if he can identify it.

Justice Jackson. Is that properly marked as Exhibit 104 for identification? It is Exhibit 103 if you are keeping rotation.

Mr. Steffen. We are out of rotation, that is the point. We are taking Exhibit 104 in advance of Exhibit 103.

Justice JACKSON. I see.

The WITNESS. Yes.

By Mr. STEFFEN.

Q. That letter was signed by you?

A. The signature was not written by me, but that is a facsimile of my signature, but a stamp was used for signing the mail.

Q. And how did you come to be writing Mr. McCrady,

if you know?

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A. Well, he was the president of the company, and he was really the only one of the company, outside of myself, that took any interest in the operation or the running of the plant. In addition to that, he was familiar with this possible threatened litigation over the infringement of the wall board edge.

Q. Was he a member of the committee that the Board of Directors had authorized to negotiate?

A. He was also a member of that committee, if that was appointed before this time, and I don't remember the dates. He and Mr. Davis and myself were three members of the committee, as I remember.

Q. Now you are reporting at that time, of a meeting with Mr. Blagden. Did you arrange the meeting with Mr. Blagden in order to handle a matter of this character con-

cerning the Utzman and Birdsey litigation?

A. My recollection is that there was no prearranged plan for a meeting, and that I did not make a special trip. In connection with my business I was in Buffalo usually on an average of once every thirty days, and my recollection is now that it was on these trips that I contacted Blagden for this meeting.

Q. And who was Mr. Blagden?

A. Mr. Blagden at that time was President of the Beaver

Products.

Q. Was he interested in the negotiations with Mr. Avery and the United States Gypsum Company concerning a license agreement?

Mr. Bromley. I object to that as immaterial and incompetent because calling for a conclusion.

Justice STEPHENS. Read the question, please? (The reporter read the pending question.)

Justice STEPHENS. It seems to me objectionable, but I will hear you.

Mr. STEFFEN. I will rephrase it, if your Honor will permit.

Justice STEPHENS. Very well.

Mr. STEFFEN. Would you describe, if you will to the Court, what took place at your meeting with Mr. Blagden in Buffalo?

Mr. Bromley. I object to that as incompetent and immaterial, incompetent because hearsay and not binding on the defendants represented by me.

I'r. STEFFEN. I would say, Your Honor, if I may speak, that this is distinctly not hearsay, that it is alleged in Paragraphs 47, 48 and 49 of the complaint that the conversation took place in 1925 and 1926, and that Mr. Blagden and Mr. Griswold were two of the moving spirits at that time, and the whole negotiations were taking place at that time; according to the Government's contention of the case, there is nothing more relevant in the case.

Justice STEPHENS. Well, relevancy and hearsay are two different questions.

Mr. Steffen: There is no question of hearsay.

Justice STEPHENS. Why isn't it, Mr. Bromley, like the words of a contract? If these events occurred and these things were said, why aren't they circumstances, regardless of truth, which bear upon the general charge of conspiracy?

Mr. BROMLEY. Because they are words said and things done not in the presence of any defendant represented by me or any representative of any such defendant.

Justice Stephens. Well, I am talking about a real exception to the hearsay rule. If they are in exception to the hearsay rule then they don't have to be in the presence of the defendant.

Mr. Steffen. We claim them as declarations against interest, which are of course exceptions to the hearsay rule.

Justice STEPHENS. By whom?

Mr. Steffen. By co-conspirators. It is true we haven't tied up these conspirators. We have alleged in the complaint that they were two of the original leading parties in the formation of the combination, and any declaration by Mr. Griswold or by Mr. Blagden concerning why the conspiracy or combination which we expect to prove took place, would be admissible and the hearsay rule has nothing to do with it.

Mr. BROMLEY. It certainly can't be maintained to be binding upon us in our absence.

Justice GARRETT. What was Blagden's relation to this?

Mr. STEFFEN. He was President of the Beaver Board Company, and both Beaver Board and American were being sued for infringement. We would expect to prove,

out of that original arrangement between Mr. Griswold, Mr. Blagden were in contact with Mr. Avery, and that out of that original arrangement between Mr. Griswold, Mr. Blagden and Mr. Avery, this agreement which we have introduced this morning took shape. And the declarations of any one of the conspirators, provided we can subsequently, and to your satisfaction, tie them together as parties to the conspiracy, are admissible, and the hearsay rule, as Mr. Bromley well knows, has no application whatever.

Justice STEPHENS. We think that the objection is not well taken and it is overruled, subject of cours to the general connection of these circumstances with other circumstances indicating a general conspiracy.

Mr. STEFFEN. We expect to call representatives from each of these various companies, as I announced this morning.

Mr. Bromley. I just want to make my position clear. As I understand counsel, he is seeking to prove the conspiracy which he alleges we are a party to, by these declarations made out of our presence, and the ground of my objection is that you can't prove a conspiracy that way; that the declarations of an alleged co-conspirator are not binding until you have first proved a conspiracy. He is trying to prove the conspiracy by proving declarations made not in our presence.

There is a long line of authority that you have first got to prove a conspiracy before there become admissible declarations of co-conspirators not in the presence of the others.

Justice STEPHENS. Well, may not circumstances, including conversations the existence and content of which is later proved to have been known to other persons, be among the items which tend to prove a conspiracy?

Mr. Bromley. I should think you first had to prove an agreement, an arrangement, in order to bring the principle of agency into operation, and that is the only reason that a declaration of a co-conspirator is admissible, because if

you have first proved there was a combination, then the principle of agency operates, and each member of the proved combination has implied authority to bind the others by his statements and admissions.

Justice STEPHENS. What do you say to that, Mr. Steffen?

Mr. Bromley. There is another requirement, and that is that a hearsay declaration must have been made in furtherance of the conspiracy. But none of those rules apply until counsel first establishes a conspiracy. He can't lift himself by his bootstraps, in other words.

Mr. Steffen. We contend, Your Honor, that we have made a prima facie case by the introduction this morning of all of the agreements which have been signed, identical agreements, between each of the different defendants here, and what we are endeavoring now to do is to show what the purposes of that conversation were. Those agreements are identical, they are all signed by the defendants, and

they form a combination which is clearly one, I think, to fix prices and to restrain trade, unless excused by

virtue of the General Electric case.

With that as a prima facie showing of combination, whether it is illegal or not illegal, as the Hitchman Coal & Coke case will show in our brief, it is admissible then for us to show what the purposes of that agreement were, and we can do that by the declarations of anyone who took part in the formation of what eventuated as being the combination.

Mr. Bromley. My position as to that is that these differently dated agreements, which are in evidence, covering a long period of time, over three years, do not prove any combination or conspiracy such as is required that there be proved first in the Hitchman Coal & Coke case. There there and were going to use force and fraud and violence to vention and had a meeting at which they adopted the plan to go out and try to unionize the coal company's mines. They had a meeting and an agreement with one another that they would send organizers out, and as to just what they would do.

Then it was proved on the trial that these organizers, after they got out, made statements that they were out there was a labor union, an organization which met in conunionize the mines. And evidence of their declarations was held admissible as the declarations of a co-conspirator,

but there was a meeting in hall assembled, a meeting and combination among the members of this union, the defendants in that case, as to what they would do.

My position is that that is not at all analogous to this set of separately negotiated contracts, differently dated, extending over a period of three years, from 1926 to 1929. That doesn't prove a combination among the parties to those contracts.

Justice STEPHENS. Do you have other items of evidence upon which you are going to rely to prove the combination and conspiracy itself, outside of these license agreements thus far introduced? Perhaps we are dealing with the problem of the order of testimony rather than otherwise. Can you introduce that first?

Mr. Steffen. We can, by Mr. Griswold, introduce a great deal of testimony concerning the relations in the industry and the general formation of the conspiracy, whether this particular letter is proof of that being beside the point. It seems to me that this letter is admissible as showing the inception of the purpose which eventuated in the combination, of which we introduced proof this morning.

We have proven, by introducing all of the agreements, that we have a 100 per cent organization among the different defendants here, among the gypsum board makers, let us say, in the Eastern territory of the United States. It is true that they did not sign their agreements on the

same date, although many of them are very close to the same date. It is true, however, that they were identical in form, and we are now seeking largely to show that that combination had, as its real purpose, not the exploitation of the patent license but had as its purpose the fixing of prices upon the sale of gypsum board, and it was incidental that they should enter into the matter of licensing under the patent.

Mr. BROMLEY. Now it can be very easily tested, it seems to me, whether that is a sound theory. Does my friend mean to indicate that because of these contracts that Ebsary became the agent of the Certain-teed Company; or that the National Company became the agent of the Ebsary Company just because they had contracts with the U.S.G.? You can't possibly infer from these license contracts any combination which makes operative the principle of agency, and it is the principle of agency that is the essential thing to make valid and binding on all the members

of a combination what anyone says or does, and this rule, by the way, applies not only to what a member of a combina-

tion says, but to what he does.

If the Government first proves there was a combination, then each is the agent of the other and anything that one does, either by way of act or by way of declaration, is binding on all. But it is a very serious step to apply that rule before any combination has been established, and I don't believe that it is possible to say, tested with relation

to agency principles, that the existence of these contracts between the U.S.G. and its licensees, would.

by any stretch of the imagination make one licensee the agent of the other, or the agent of the licensor, or the licensor the agent of any licensee, sufficient to make the principle of agency operate so that the acts and declarations of one would become the acts and declarations of all, or binding on all, or binding on the others.

And I think the law is perfectly clear that you have to have proof of some combination, some association together, that is definite enough to make one the agent of all.

Justice STEPHENS. I assume that Mr. Steffen doesn't dispute that rule, that there must be an agency to ultimately make the declarations or acts of the co-conspirators binding upon each other. But I 'nd understood he was offering this conversation as one of the circumstances indicating that arrangements were made to get nogether.

Mr. OLIVER. May I say a word?

Justice STEPHENS. Yes.

Mr. OLIVER. I have tried to follow this closely, but it seems to me that the question which was objected to was whether or not Mr. Blagden was interested—

Justice STEPHENS (interposing). Well, that was withdrawn. I indicated that the question in that form was objectionable, and it was withdrawn. There was a question following it, however.

714 Mr. BROMLEY. The question was as to what occurred at the meeting between Blagden and Griswold.

Justice STEPHENS. Will you read from the record the exact question to which objection is now being made, and will you type it up and furnish it to me immediately after the recess. Read it now, if you can find it. This objection

will go to a large class of testimony, apparently, and inasmuch as it is near the recess time, and as defeindants' counsel want to examine these exhibits, we will consider this matter during the evening, if you can leave one set of these exhibits with us. Perhaps you could leave the original of the letter which is now under discussion, with us.

Mr. STEFFEN. It is D-4 on your set.

Justice Jackson. If you can let us have the original, then one of the defendants can use this set of exhibits.

Justice Stephens. Will the reporter now read the particular question to which objection is made?

(The reporter read the pending question as follows:)

"Mr. Steffen. Would you describe, if you will to the Court, what took place at your meeting with Mr. Blagden in Buffalo?"

Justice STEPHENS. I assume the question intends to have the witness answer what took place in the way of conversations?

Mr. STEFFEN. We include that.

Justice STEPHENS. We will be in recess until to-

715 morrow morning at 10:00 o'clock.

(Whereupon at 4:00 o'clock, p.m., the hearing was recessed until Thursday morning, November 18, 1943, at 10:00 o'clock).

716 In the District Court of the United States For the District of Columbia

Civil Action No. 8017

United States of America, plaintiff'

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING, Washington, D. C., Thursday, November 18, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., before Honorable Harold M. Stephens,

Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia, pursuant to adjournment.

Appearances, (Same as heretofore noted.)

Now with respect to the matter of this testimony which was under discussion at the conclusion of yesterday's session the ruling of the Court is as follows:

The law is well settled that the declarations of conspirators or the acts of conspirators are admissible, that is, of one conspirator against the others, provided prima facie evidence of conspiracy has been shown, but not

otherwise. The declarations are not admissible to prove the conspiracy, they are only admissible after

the conspiracy has been shown.

However, it seems to us that the problem is really more one of order of proof at the moment than of anything else, because we ought not rule, it seems to the Court, at the present time, whether or not a prima facie case of conspiracy has been made. We ought to have the opportunity of inspecting these exhibits with much more pains, we ought to have the benefit of argument of counsel on both sides, we ought to perhaps hear other circumstances and evidence.

Consequently, we think we ought not make a ruling now that a conspiracy has or has not been shown prima facie. It would seem, therefore, that the sensible thing to do would be to allow the witness to testify to these declarations, with the understanding that they are not received in evidence as proof of the conspiracy, but that they are only received in evidence subject to ultimate proof of prima facie character of the existence of a conspiracy. If that proof fails, then these declarations will be stricken out and not considered. If that proof succeeds, then they will be considered.

For the record, I may state that there are two cases in the District of Columbia, Heppel v. United States, 66 Appeals, D.C., 71 (1936), and Lorenz v. United States, 24

Appeals, D.C., 337, (1904), in which exactly that ruling was made, that the matter is properly one of order of testimony, and that it is not error to receive the declarations out of order, provided it is understood that they are to be considered not as proof of the conspiracy, but only if the conspiracy is proved aliunde the declarations.

With that understanding the objection to the proffered testimony of Mr. Griswold is overruled.

Mr. BROMLEY. May it please the Court, I assume, and I hope not presumptuously, that the basis of this ruling is that the Government has or will indicate, by way of a promise or assurance to the Court, that it has some independent evidence of a conspiracy. As I understand the order of proof rule to which Your Honor has referred, there must be a statement by counsel in the nature of a professional assurance, or a promise as some courts say, that he has other evidence.

Now we went through this in the criminal case, where that assurance was given to the Court, and we were there for 6½ weeks and the assurance was not performed. It seems to me here that that should be an implied condition of the ruling, and I mention it now only because, as I understood him yesterday, he said he would make no such

assurance, that he had no other evidence.

Justice STEPHENS. I didn't understand that, Mr. Bromley, and the Court has made the ruling upon the assumption that the Government, in good faith, expects to be able to prove a conspiracy and combination. Of course, otherwise it would be idle to sit here for weeks and listen to declarations. I assume the Government itself wouldn't want to spend that time; and we do make the ruling upon the assumption that the Government is proceeding upon the assurance that it has evidence to prove a conspiracy, that it so believes in good faith towards the Court and counsel.

Mr. Bromley. I understood him to say yesterday that he had only the agreements and no other proof of a conspiracy.

Justice STEPHENS. I think you misunderstood Mr. Steffen in that. I inquired myself, I think the transcript will show, whether there were other items of evidence tending to prove a conspiracy upon which he would rely, and he said yes, there were.

Mr. Bromley. And that, I assume, is his position now, that he gives us that assurance that he has other evidence?

Mr. STEFFEN. I surely will.

Justice Stephens. You may take the witness stand, Mr. Griswold, unless there is something else to come up first.

There is one other matter before we start taking testimony that ought to be discussed. You may take your seat, however, Mr. Griswold.

Mr. Johnston suggested this morning to me that it would be a very great convenience to all counsel if a serially arranged list of exhibits could be kept by someone so that not merely the index which appears at the beginning of each transcript, where exhibits have been introduced, appears, and it shows the transcript pages, but a serial index giving the number of the exhibit, a brief description of its contents, and a reference to each page of the transcript on which it is mentioned for identification, for offer, for acceptance, rejection, or what-not; and he wondered if some arrangement could be made for the keeping of such an index.

I am myself attempting to keep such an index in my own Chambers for my own convenience, but my secretary who is keeping it is also engaged in preparing an abstract of the record, and I am afraid I can't offer her services to

sit here in the court room to keep an index.

I wondered if the Court Reporter could, without undue inconvenience, expand the index which he is already making into that kind of an index. It wouldn't be very much more of a job. The index today says "Government's Exhibits Nos. 1 to 5, inclusive—page 919". It would, of course, require some rearrangement of the indexing method.

What do you think about that, Mr. Paul?

Mr. PAUL. I think we can arrange it. I will get in touch with Mr. Johnston and find out exactly what he wants, and I think we can arrange to do that.

Justice STEPHENS. It also occurred to me that possibly one of the juniors in one of the defendants' firms

724 might possibly be able to do it.

I would offer the services of the Clerk of the Court to do it, but unhappily the Clerk's office is four men short at the present time, and another resignation in the offing, and we have had to make a change of Clerks this morning. And the Clerk is very busy outside of the actual court hours, and I am afraid I can't do that.

So I will ask the Court Reporter to do that, if possible,

Mr. PAUL. We will endeavor to work it out.

Mr. BROMLEY. If he can't, we will be able to do it.

Justice Stephens. Will you report to us if it is an undue burden, and will you do it in cooperation with counsel for both sides so as to get some regular system which will suit and please the convenience of all?

Mr. PAUL. Yes, sir.

Justice STEPHENS. Now you may proceed.

Thereupon, FRANK J. GRISWOLD, the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

DIRECT EXAMINATION (resumed) by Mr. STEFFEN.

Q. Yesterday, Mr. Griswold, you were telling of having gone to Buffalo about May, 1926, and at Buffalo you had met Mr. Blagden, I believe you testified, and I asked you the general question, at the close of the session yesterday, what took place in your conversation with Mr. Blagden at Buffalo, on the date that the meeting took place?

Mr. BROMLEY. The same objection, of course, if Your Honor please.

Justice STEPHENS. The record may show the objection, and the same ruling.

The WITNESS. As I remember the meeting now, Mr. Blagden simply reported that the decision, I guess, had been rendered at that time, I am not sure, or at least he reported his troubles with the United States Gypsum Company.

At that time I think Mr. Blagden had only been President of this company for a short time. The burden fell on his shoulders to run the company, and among the other difficulties was this litigation he had with the United States Gypsum Company. And he reported to me, at my request, what efforts he had made, and what the Ccurt had done about it so far. I was vitally interested because we were threatened with infringement, and I was anxious to find out where the Certain-teed Products or the Beaver Board, whichever it was at this time, stood.

Justice Stephens. You were anxious to ascertain what?

The WITNESS. To find out what he had done with regard to settling the case, and what the Court had ruled in his case. I wasn't familiar with it, I hadn't heard.

726 By Mr. STEFFEN:

Q. Do I understand that you say the Beaver Board people were in litigation with USG at this time?

A. Well, the Beaver Products Company, which at the time this letter was written seems to be the company that Mr. Blagden represented. And he had only recently, a short time before, become President of the Beaver Products, and he had these interviews, as he reported, I don't remem-

ber how many he had had, with Mr. Avery, in an attempt to get them adjusted and settle the litigation.

Q. To settle the litigation with the USG?

A. With the USG.
Q. And did he ever tell you, or state whether or not he told you of the meetings that he had with Mr. Avery?

Mr. Bromley. May I have a continuing objection to this line of testimony, if the Court please?

Justice Stephens. The record may show that all of the testimony of declarations of statements between Mr. Blagden and Mr. Griswold and others, outside the presence of the defendants or their representatives, are received subject to the objection and to the ruling which the Court has just made with respect to Exhibit 104, and that class of testimony.

Mr. STEFFEN. Would you repeat the question? (The pending question was read by the reporter.)

The WITNESS. I don't remember of him telling me, he possibly did, but I don't remember at this time; except in a general way that he had had one or more, I don't remember how many.

By Mr. STEFFEN.

Q. Meetings with Mr. Avery?

A. Yes.

Q. State whether or not he said that he had discussed the amount of a possible royalty with Mr. Avery?

A. My recollection is that he said that he had.

Q. Do you recall what the amount of the royalty was that

Mr. Blagden spoke of?

A. Well, this was my earliest recollection of any figure of what the royalty might be, and as I remember it, Mr. Blagden reported that it was either \$2 or \$2.10 per thousand square feet. That applied, as I remember it, to future -from this point on-not to past infringements.

Q. Was that figure acceptable to you and Mr. Blagden?

Mr. Bromley. I object to the form of that question as leading and calling for a conclusion.

Justice Stephens. Is this witness within the rule with respect to leading questions? There is a rule, I think you are all familiar with the rule, the new rules permit crossexamination of any adverse party or the officer of an adverse party, stating it roughly. Is he within this rule?

Mr. STEFFEN. That rule applies, as I understand it, to an officer of a defendant, and while American is supposed to be a conspirator, as we contend, it is not a present defendant.

I will rephrase the question.

Justice STEPHENS. Well, it is technically leading. You might ask him, rephrase your question and ask him to state what happened or what was said, so as not to suggest the answer.

#### By Mr. STEFFEN.

Q., State whether or not, Mr. Griswold, you and Mr. Blagden discussed whether you would accept a \$2.10 royalty?.

A. Well, as I remember it at this time, we thought that

was a little bit high, because

Justice Stephens (interposing). Answer the question, Mr. Griswold. We don't want to be over-technical with you, but we must confine the answers to the questions. The question was did you and Mr. Blagden discuss whether or not you would accept that?

#### By Mr. STEFFEN:

Q. That can bé answered yes or no.

Yes, I think we did discuss it.

Q. What was your discussion?

Mr. BROMLEY. May his answer, "we thought", and so forth, be stricken?

#### Justice STEPHENS. It may.

729 By Mr. Steffen.

Q. Well, is it your best recollection that you did discuss it, or not?

A. Yes, Q. What was your discussion, Mr. Griswold, concerning the royalty of \$2.10 which Mr. Avery had asked?

A. As I remember it now, I did not object so seriously to it. I think it was Mr. Blagden that thought the royalty should be reduced from that amount, but I had gone into the matter probably to a greater extent than he, and I considered it more favorably, as I remember it, at that time.

Mr. Bromley. I move to strike that out as not responsive, it doesn't give the conversation.

Justice STEPHENS. Well, I think, Mr. Bromley, that technically speaking, whether or not an answer is responsive is an objection that lies only in the mouth of the examining counsel, because he might make it responsive by asking another question. I think the witness is really trying to give the substance of what was said in his own way. I deny the motion.

By Mr. STEFFEN.

Q. Now, Mr. Griswold, will you state whether or not you and Mr. Blagden discussed the matter of fixing prices on gypsum board?

Justice STEPHENS. Please repeat the question.

By Mr. STEFFEN.

Q. State whether or not you and Mr. Blagden discussed a plan for fixing prices and stabilizing them for a period of 10 or 15 years?

Mr. Bromley. I object to that as incompetent, because leading and calling for a conclusion.

Justice STEPHENS. Strictly speaking, Mr. Steffen, you

should ask the witness what was discussed there.

I do not think, however, Mr. Bromley, it is objectionable to ask the witness if certain topics of discussion were gone into, because the witness is not himself a trained lawyer, and perhaps doesn't make quite the discriminations that we do.

You may proceed, Mr. Steffen.

Mr. Steffen. Will you read the question?
(The pending question was read by the reporter.)

The WITNESS. We did not.

By Mr. STEFFEN.

Q. Mr. Griswold, I direct your attention to the final paragraph of the letter, and ask if that will refresh your recollection? I am referring to Government's Exhibit 404. Please read that. It is dated May 12, 1926.

My question, Mr. Griswold, is—does that refresh your recollection as to one of the subjects which you discussed

with Mr. Blagden?

A. To this extent, that apparently at this meeting we had been discussing the possibility of a license agreement with the United States Gypsum Company, and I think Mr. Blagden and I thoroughly understood at

that time that the law granted to the United States Gypsum

Company, under the authority of the patent they were claiming, the right to fix prices, and if one or both of us took out a license we probably would have nothing to say about the price, as the licensor had the authority to tell us what price at which we should sell the licensed product, and it would probably have a stabilizing influence on the market.

But so far as us discussing prices between ourselves,

fixing prices, absolutely not.

Q. Do you recall whether you and Mr. Blagden discussed the length of time for which the price might be stabilized under a license agreement?

A. No, I do not remember.

Q. Will you please refer to Exhibit 104 and see if that

refreshes your recollection?

A. To the extent that we probably had in mind that the license, if it was taken out—the patent had 14 or 15 years to run yet—and the licensor would have that authority over us, and the price we were to sell the product at, for that time.

Q. Did you discuss any particular patent with Mr. Blag-

den?

A. Well, we discussed the Utzman patent. There 732 were really only two, as I remember it, patents really under discussion, so far as wallboard edge at that time was concerned. One was the Utzman patent, which the United States Gypsum Company were using in the manufacture of their product, and the other was this Clark or Birdsey patent, which we were manufacturing board under, the Clark patent. And the United States Gypsum Company claimed the Birdsey patent, they were practically the same thing. Those were the two that we had in mind at that time, as I remember it.

Q. Do you recall, Mr. Griswold, whether you discussed any other patents with Mr. Blagden at this time, upon which your company and Mr. Blagden's company might take a license from USG?

A. No, I do not remember, without something to refresh my mind, I don't remember at this time.

Q. Do you know at what time the Utzman closed-edge board patent would expire, or did you know at that time?

A. I don't think I really knew, at that time, what time it did expire. I remember at the start I felt it had several years to run yet, but I had never looked at the date of the patent, I think, because we were interested in the Clark patent, we had paid no attention to the Utzman patent, and had gone ahead and manufactured board under what we considered was our own patent at that time.

Q. Did you subsequently learn when the Utzman patent expired?

A. Yes, later on I found out.

Q. And could you state now?

A. I think, as I remember it, it expired in about 1937, or somewhere thereabouts.

Mr. Steffen. I will state as a matter of record that the Utzman closed-edge patent expired on August 6, 1929, and your letter was written in 1926.

The WITNESS. That is right.

Mr. BROMLEY. The Utzman machine patent did expire, just as the witness said, in 1937.

By Mr. STEFFEN.

Q. Now did you and Mr. Blagden discuss, in addition to the closed-edge patent which you have spoken of, a second Utzman patent under which you might take a license?

A. I don't remember doing so, at this time.

Mr. STEFFEN. We offer Government's Exhibit 104 in evidence.

Mr. BROMLEY. The same objection as heretofore stated.

Justice STEPHENS. For what purpose is it offered, Mr. Steffen, just to refresh the recollection of the witness?

Mr. Steffen. No, I offer it generally as a declaration of a co-conspirator.

Justice STEPHENS. Let me see it, please.

Mr. Steffen. In furtherance of the plan of conspiracy.

734 Mr. OLIVER. I would be glad to join in Mr. Bromley's objection, if it is necessary.

Justice STEPHENS. This may be received in evidence subject to the ruling of the Court already announced on this class of testimony.

(The letter of Mr. Griswold to Mr. McCrady, dated May 12, 1926, was marked as Government's Exhibit No. 104 and

received in evidence.)

Mr. FINCK. If the Court please, may I make a further objection on behalf of National? It seems to me that in order that the statements or admissions of one co-conspirator may be binding on the others, that a combination must

exist at the time that the statements or acts were made or committed, and in so far as National is concerned I understand now, from the opening statement and admission of Mr. Steffen, that the combination was formed at the time the agreements were entered into, and that makes the date May 17, 1929, for National, when it presumably joined the combination, if there was one.

Now the American did not join the combination by any agreement until long after that time, and prior to the joining of the combination Mr. Griswold, as the agent of American, was no longer with that company. So that it doesn't seem to me that the application of the principle of

principal and agent exists here, and I don't see how any of this testimony that Mr. Griswold can give can be binding on National, if he is to speak as our agent. He was never a member of this combination, if there was one, at any time while we were a member of the combination.

Justice STEPHENS. Will you state those dates again, I am sorry but I don't quite get your point, Mr. Finck.

Mr. FINCK. National signed its first license agreement with USG on May 17, 1929. Mr. Griswold was out of business at that time, he was never a member of this combination at any time that National was in it. Furthermore, he was out of American before American joined the combination, because they did not take a license—

Justice Stephens (interposing). What is the date of these conversations that he is talking about?

Mr. FINCK. In 1926.

Justice STEPHENS. And National came in in 1929, I see your point.

Mr. FINCK. Yes. Griswold resigned prior to the time that National came into the combination. He was no longer in the business on May 17, 1929.

Justice STEPHENS. Was his company still in the business?

Mr. FINCK. His company was still in business, but they didn't join the combination until some time thereafter, and they certainly were not members of this combination at the time Mr. Griswold could speak of.

Justice STEPHENS. What do you say to that, Mr. Steffen?

Mr. Steffen. Well, I say that I think the argument is all predicated on a misapprehension of the situation as regards when the combination was formed. All that I said, and I want to make the record very clear, is that the combination and conspiracy in 1929 became full blown, it became a clearly illegal combination at that time under the Masonite case, but we did not say that it then and for the first time came into being.

We say that it rather started back in 1925 and 1926, and parties were added from time to time. National came in a little later, and the combination became a complete mo-

nopoly by 1929.

Mr. FINCK. Well, Your Honor, with respect to this particular exhibit, it couldn't affect National, because National did not manufacture any board until June, 1926, so that as to this exhibit dated May 12, 1926, I don't see how that can be accepted or is competent as against National or any of these other defendants who joined the combination later on.

Justice STEPHENS. We are in difficulty, Mr. Finck, of only being able to judge of this case piecemeal, at the present time. We don't know, from any evidence here, when National started manufacturing board.

Mr. FINCK. Well, that is true, I think that is admitted, they admit that in the Complaint, that is all outlined in the Complaint, Your Honor.

Now in the Hitchman case, it says:

"In order that the declarations and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that there was a combination between them and defendants ""—— that there was one, there must be a combination in existence if this evidence is going to be received by one co-conspirator against another.

And then, furthermore, it must also show that it is in

furtherance of the conspiracy.

Now how on earth could he commit any act or make any statement in furtherance of the conspiracy before his company was a member of this combination? It couldn't be done, as far as I can see.

Justice STEPHENS. What do you say, Mr. Steffen, to that?

Mr. Steffen. Well, I say that I think Mr. Finck's arguments proceed upon the same error that there could be no combination until there is a written agreement.

Mr. FINCK. No, no.

Mr. STEFFEN. And that National didn't sign a written agreement until sometime in 1929.

Justice STEPHENS. What do you say to the proposition that Mr. Finck announces, that it is admitted in the pleading that National wasn't even manufacturing board at the time of these conversations?

Mr. STEFFEN. Well, I would cite Your Honor the case of Roberts v. United States, 248 Fed. 873, which has to do with the question of a continuing conspiracy where additional parties are added from time to time, and the objection was made in that case, just as Mr. Finck is making it here, that the particular party was not a party to the original conspiracy or a party at the beginning.

And the Court there said:

"We do not find that the admission of evidence relating to matters that occurred prior to Roberts' connection with the case was in any way prejudicial to the defendant Roberts. This evidence was purely introductory, and was only significant in the light of the testimony relating to the proceedings in which the defendant Roberts afterwards participated. Besides, the evidence was admissible under the familiar rule that, where a person enters into a conspiracy after its formation, the acts and declarations of the other conspirators before he entered are admissible against him."

It is our contention that the conspiracy took complete shape and was of an illegal character in 1929, but that the roots of the conspiracy started in 1925 and 1926, and par-

ties were added, and that it took substance and form
as it progressed. Our evidence here is largely to
show the substance and form of the conspiracy which
was then in being and growing, and to which additional
parties were added.

Mr. FINCK. I would like to have Mr. Steffen answer your question, he didn't do it.

Justice Stephens. I think he did. The question I asked was what he answered in respect of your question that National didn't manufacture board at the time of these declarations, and he answered by citing this authority to the effect that if the evidence eventually shows that National joined the combination, the Federal Court which he cites has decided that once it has joined the combination it has adopted it, and it is bound by what was said by the co-conspirators before or afterwards.

Mr. FINCK. I agree with that statement, but I don't agree that the statements can be made by some outsider, some third person who was not a member of the combination at the time the statements were made.

S. S. S. S.

Justice STEPHENS. Perhaps that is a further point, Mr. Steffen, I ought to hear you on. Now the point is that at the time these statements were made, American was not part of the conspiracy.

Mr. Steffen. We would contend that American, and Mr. Blagden, were in process of going into the conspiracy as of this time, 1926, and that American subsequently did join the conspiracy by signing agreements, I mean they made their joining complete in 1929 by signing the agreement which all the other manufacturers signed at that time.

Justice STEPHENS. It seems to me that the problem is the same problem we ruled on at the outset of this morning's session, Mr. Finck. These declarations are not being received by the Court to prove the existence of the conspiracy or to prove that American entered the conspiracy. They are received subject to the duty of the Government to prove that a conspiracy was entered into at such time as would make these declarations and in such manner as would make them admissible as binding upon co-conspirators. But the same ruling will be made, with an exception for your client.

Mr. STEFFEN. I should now like to read for the record Government's Exhibit 104, which is short. It is a letter by Mr. Griswold addressed to J. H. McCrady, under date of May 12, 1926:

"MR. J. H. MCCRADY,

c/o McCrady Brothers Co., Braddock, Pa.

Dear Sir: I just returned from a meeting at Buffalo yesterday with Mr. Blagden, President of the Beaver Products Company. He has had one or two interviews with Avery on the matter of settling all disputes and litigations

between the wall board manufacturers by entering 1741 into a licensing arrangement and the thing looks very favorable. We are standing on 50¢ per M royalty. Avery is talking about \$1.00 per M and I am inclined to think he will probably stand pretty firm on this price. However, on his own admission he has so much at stake on the proposition that he may change his views.

This matter will be discussed by all the independent wall board manufacturers at a meeting in Chicago next Wednesday afternoon and probably some definite action taken on it as the probabilities are that Avery may meet with us at that meeting. If you feel able to attend the meeting I will be very glad indeed to have you be there. According to the plans we have we figure that there is a possibility of us holding the price steady on wall board for the next fourteen or fifteen years which means much to the industry.

Yours truly.

THE AMERICAN GYPSUM CO.

(S) F. J. GRISWOLD."

By Mr. STEFFEN.

Q. Now, Mr. Griswold, do you remember whether there was a meeting or not in Chicago, of the independent wallboard manufacturers?

A. I do not, without something to refresh my memory.

I couldn't remember it at this time.
Q. You used the word "independent" in your letter.

What did you mean by "independent"?

A. By that I had reference to the manufacturers of wallboard that were independent, separate companies. The United States Gypsum Company was the largest concern in the country that was in the business, and anybody else was considered an independent manufacturer.

Q. Could you state what the occasion of the meeting of the independent wallboard manufacturers was, on the

Wednesday mentioned?

Mr. OLIVER. I object to the question. He hasn't even established that there was a meeting on Wednesday.

Mr. Steffen. I will strike the question.

By Mr. STEFFEN.

Q. State whether or not the wallboard manufacturers

held meetings from time to time for any purpose?

A. Well, I do not remember of them holding very many, if any, special meetings of the strictly wallboard manufacturers, but practically every member of the every company that manufactured gypsum products east of the Rocky Mountains was a member of this gypsum association, gypsum industry association-it was called several different names at different times and those meetings were usually held once a month, and such meetings as are referred to in these letters by me as being a special meeting, undoubtedly those meetings were at the time the gyp-

sum industry held their meetings, because that was at the time to see these people when they would be together, and it is undoubtedly what I had in mind there. I think if the records could be looked at that would show.

Q. I will show you Government's Exhibit which has been marked for identification No. 103, and ask you to examine that, please, and tell us whether that refreshes your recollection as to whether there was a meeting on the Wednesday

mentioned in your previous letter?

A. It does to this extent. There was a meeting, but I still am of the opinion that it was not a special meeting called for that particular purpose, that it was a meeting in conjunction with this meeting of the gypsum industry, in which all of these people were present, attending the industry meeting, and we undoubtedly discussed this license situation at the same time, and I think, as I remember, that is what this refers to.

Q. What was the purpose of the Gypsum Industries, was

it a trade association?

A. Yes, a trade association.

Q. What sort of matters did it discuss?

A. Matters for the good of the industry, and new projects, and all that sort of stuff. They had several experts hired to develop the business, and if anything new came up they were discussed in a general way, anything that was for the good of the industry.

Q. State whether or not at this meeting on Wednesday, that you speak of, the matter of a licens-

ing agreement came up for discussion?

A. If it was at a meeting of the Gypsum Industries, the license agreement was never discussed where there were wall plaster manufacturers present, they had nothing to do with that. This was only discussed by those people who manufactured wallboard, and by all of them, due to the fact that this patent litigation was up at that time.

Q. Can you state whether or not there was a meeting of the wallboard manufacturers at or about the time of the

Industries meeting?

A. There was a meeting held, but as I state, not a special meeting called for that, a meeting in conjunction with

this other meeting.

Q. Now at that second meeting on Wednesday, did the wallboard manufacturers, to the best of your recollection, discuss the licensing agreement?

A. To the best of my recollection they did.

Q. Could you tell us what manufacturers of wallboard were present at the meeting at which the licensing agreement was discussed?

A. Well, I could not say positively at this time, that is

too long ago. The records probably might show it.

Q. Could you tell by examining Government's Exhibit No. 103?

A. According to this letter, they were practically

all there.

Q. Well, I would like your recollection, Mr. Griswold. Does that refresh your recollection as to who might have been there?

A. No, this doesn't. Just a minute until I read this-

Mr. FINCK (interposing). May I ask what Exhibit No. 103 is?

Mr. KNUFF. D-5, in the photostats that you have.

Mr. FINCK. Thank you.

The WITNESS. It only mentions two, Mr. Blagden's and Mr. Avery's names are mentioned, but there are no other members mentioned in this letter, and I do not remember who was there.

#### By Mr. STEFFEN.

Q. What was the Atlantic Gypsum Company making board at this time, do you recollect?

A. What company?
Q. The Atlantic.

A. Well, I could not say definitely without something to refresh my memory; but I do not think they were in the business at that time.

Q. Was the Universal Gypsum Company manufacturing

board in 1926?

746 A. As I remember it, they were at that time.

Q. Do you recall whether a representative of Universal was at this meeting on Wednesday?

A. I do not remember positively at this time.

Q. Was Texas manufacturing wallboard at this time?

A. I don't think they had started the manufacture of wallboard at this date.

Q. Was Ebsary manufacturing wallboard at this time? A. No, Ebsary's plant was not built that early, it was at a later date than that.

Q. Was the Beaver Products Company manufacturing gypsum board at this time?

A. Yes.

Q. And do you recall whether a representative of the Beaver Products Company was present at this meeting?

A. Mr. Blagden's name is mentioned here, so he evidently

was present or I wouldn't have mentioned it.

Justice STEPHENS. Do you recollect yourself whether he was there?

The WITNESS. No, I can not say that I remember that he was there.

By Mr. STEFFEN.

Q. Was the Niagara Gypsum Company manufacturing board at this time, Mr. Griswold, if you recollect?

A. I think they were, but they had not been manu-

747 facturing any great length of time.

Q. Do you recollect who was President of Niagara?

A. M. A. Reeb of Buffalo.

Q. Do you remember whether he was present or not at this meeting?

A. No, I do not.

Q. Was the Certain-teed Products Company making gypsum board at this time?

A. I could not say, but if they were it was at Acme,

Texas, not up in this northern territory.

Q. Do you recall whether there were any manufacturers present at the meeting on Wednesday who were not making gypsum board? I refer you to the first part of the exhibit.

A. I do not remember, but the letter states that there were two who were contemplating going into the wall-board business, or would soon be in production and were building plants, probably at that time.

Justice STEPHENS. Please read the question and answer. I didn't get it.

(The record was read by the reporter.)

Mr. FINCK. If the Court please, I object to that, and move to strike it out as not responsive.

Justice STEPHENS. I think, Mr. Finck, that the objection that a question is not responsively answered can only be made by examining counsel, for the reason

tion which, reframed, will make it responsive. You will have to object on some other ground than that.

Mr. BROMLEY. We New York lawyers seem to have that rule backwards.

Justice Stephens. Perhaps the Court has it backwards. I don't claim to be infallible, gentlemen, but I think that really is the rule, that adverse counsel can object on the grounds of irrelevancy or incompetency or on other grounds, but if it is not responsive the person who has asked the question is the one who should object.

The Court so far isn't asked to consider, and I suppose it won't be asked to consider, anything but what the witness

recollects himself.

Mr. Adams. That is the basis for my objection. I don't think he should be permitted to read what is said in a letter unless he says this refreshes his recollection. I don't think we should take as evidence simply what he now reads from the letter, and I therefore object.

Justice Stephens. The Court is not considering as evidence what he reads from the letter, but only his recollection.

Mr. OLIVER. May I make the additional observation that the document is not signed by anyone, and I don't think it has been established that this was a letter of Mr. Griswold's.

Justice STEPHENS. Well, I don't think that objection is well taken, Mr. Oliver. If anything, 749 whether a stick or stone or a letter or anything else, refreshes the witness' recollection, whether it is an object or a writing, it may be shown him to refresh his recollection. But it is not evidence, and the Court is not considering it as evidence. .

# By Mr. STEFFEN.

Q. Mr. Griswold, do you recall having attended a meeting on the date mentioned in Government's Exhibit 103? A. Yes, I have a recollection of attending the meeting.

Q. Do you recall whether Mr. Avery was at that meet-

ing?

A. I think at some time during the meeting Mr. Avery was there; whether it was where we were meeting or whether they went over to the United States Gypsum Company offices, I do not remember.

Q. Could you tell by referring to the exhibit, would that refresh your recollection as to where the meeting was held at which Mr. Avery attended? I refer you particularly

to the second paragraph.

A. The second paragraph?

Q. Yes.

A. There was a meeting the next day after the first meeting. Whether that has reference to the Gypsum Industries meeting or the wallboard manufactureres, I couldn't say,

the first day-Q. (Interposing). My question, Mr. Griswold,

750 is—could you tell from examining the second paragraph there, or does it refresh your recollection so that you can now say of your best recollection where the meeting was held at which Mr. Avery attended?

A. I could not say where it was held. It was at a place in Chicago, but at just what point I do not remember at this time, and I can't tell from this letter.

Q. Can you tell the Court whether the matter of the licensing agreement was discussed with Mr. Avery at this meeting-again I refer you to the second paragraph, if that is necessary to refresh your recollection?

A. Yes, the license agreement proposition was evidently

discussed at this meeting.

Q. Will you state what the discussion-

Mr. Bromley (interposing). I move to strike that answer out on the ground that it states a conclusion, because he says "evidently".

Justice STEPHENS. The witness said, Mr. Steffen, that it was evidently discussed. In view of the witness' care in his answers, I take it that he means by that that he doesn't remember, himself; and if that is true, if he is simply stating what is in that record, it may go out.

# By Mr. STEFFEN.

Q. May I ask, Mr. Griswold, to have you state whether or not you now recollect that the matter of the licensing agreement was discussed at that

meeting at which Mr. Avery was present?

A. No, that is too long ago, I could not state positively that it was discussed without something of this kind to

refresh my memory.

Justice Stephens. You are entitled, Mr. Griswold, to look at these items that are submitted to you, for the purpose of helping to refresh your recollection, we all need to refresh our recollection at times. But what the Court is interested in having, of course, is your own recollection, if you have any; and if you haven't, you should frankly state that you haven't, as you have stated.

#### By Mr. STEFFEN.

Q. To further refresh your recollection, possibly, Mr. Mr. Griswold, I show you your answers to questions when

your deposition was taken at Port Clinton, and I refer you to page 36 of the transcript. Now, Mr. Griswold, can you state whether or not you recollect that the matter of a licensing agreement was discussed at this meeting at which Mr. Avery was present?

A. Yes, this refreshes my memory to this extent, that these notifications or suits for infringement were on, and that the patents which the United States Gypsum Com-

pany were claiming covered practically every type of edge, including the one we were making, the Clark

patent; so there was really nothing left for any manufacturer of wallboard to make except an open-edge type of board, where all four sides of the board had a raw edge. And it was a matter that those who were manufacturing board and those contemplating the manufacture of board had to consider very seriously, because if they were only allowed to manufacture an open-edge type board they were up against a pretty serious handicap to carry the business on successfully.

For that reason they were discussing the possibility of what would face them if the United States Gypsum Company won these suits for infringement, which evidently at that time had not been decided, but if they were decided in favor of the United States Gypsum Company we would

be up against a serious proposition.

Q. Now do you recollect whether there was any statement of the attitude of the different manufacturers present, given to Mr. Avery at this meeting?

Justice STEPHENS. Please read that question. (The question was read by the reporter.)

The WITNESS. Yes, there was, as I remember it.

By Mr. STEFFEN.

Q. And what was their attitude toward the licensing agreement, as expressed to Mr. Avery?

Mr. Bromley. Objected to as incompetent and calling for a conclusion.

Mr. Adams. Moreover, I may point out that there has been no person present identified as representing any manufacturer, other than perhaps Mr. Blagden and Mr. Griswold himself, and Mr. Avery.

Justice STEPHENS. I think the question calls for a conclusion. I think you ought to ask the witness what was stated. With respect to the witness not remembering who was there, that is the first time that objection has been raised. The defendants' counsel are entitled to have the time and place and the circumstances and the persons present identified with reasonable certainty. On the other hand, we can't expect to have the witness remember the impossible. He does say that board manufacturers were present, he doesn't identify them.

I think I ought not rule that he can't answer what was said at that meeting merely because he can't identify the persons; but I think the witness ought to be asked not what their attitude was, but what they stated, in substance

and effect.

We don't expect you to remember the exact words, Mr. Griswold, but you should tell us what, in effect and sub-

stance, was said.

Your Honor, but the difficulty that I have here is in having the witness testify to something that was said at a meeting of wall board manufacturers, presumably in furtherance of the conspiracy. We have no idea who was present. Now, it illustrates again the vice in this whole situation.

I quite agree with Your Honor that it is impossible for him presently to remember all of these details, but it seems

to me that this is more fundamental than that.

Justice STEPHENS. But the witness has testified, Mr. Adams, who was manufacturing wall board at about this time.

Mr. Adams. I agree with that, but that does not say that they were present at the meeting, or that those who represented a particular company were present at the meeting; that is, if th "X" "Corporation was there, it does not say who was there in its behalf. We are at a loss to know how to meet this kind of evidence.

Justice STEPHENS. Do you remember any individuals there by their names, Mr. Griswold?

The WITNESS. No, Your Honor, not at this time. I can't recall who was at the meeting, outside of the names mentioned. Mr. Avery, I know, came at some period during the meeting, and Mr. Blagden apparently was there, because it so states in this letter, and I also stated it in my testimony.

For your information, the letter I have here is a letter in which I am reporting to the president of my own company, who was on the committee with me.

Justice STEPHENS. I think, Mr. Steffen, I will hear you.

but I am inclined to think that Mr. Adams' objection, on further consideration is well taken. Unless the witness can identify the persons present at the meeting, he can't tell what they said. Otherwise, the defendants are in no position to test the accuracy of his statements by calling those persons and examining them. He does seem to remember that Mr. Blagden and Mr. Avery were there. He may be interrogated as to what they said, but I think we will rule that he cannot tell what other persons said unless he remembers who they were.

#### By Mr. STEFFEN.

Q. I want to ask you, Mr. Griswold, to turn the first page of Exhibit No. 103 over, and read the first paragraph of the second page, and ask if that refreshes your recollection as to who may have been present at the meeting.

A. Yes; I had not noticed this second page. Mr. Shearer's

name is mentioned.

Q. Who is Mr. Shearer?

A. He was connected with the Universal Gypsum Company at that time, and was president, as I remember it.

Q. Now, would you tell the Court whom you remember as having been present at the meeting, each individual?

A. Well, Mr. Avery. I said in the other answer that I didn't remember distinctly, but evidently Mr.

Avery was there, and Mr. Blagden was there, and Mr. Shearer—those three are all mentioned—and probably there is no question but what they were there, but it is too far back, and I can't remember distinctly that far.

Justice STEPHENS. You are stating that because of what is in the writing, or because you remember it?

The WITNESS. Well, because it is in the reference here. Outside of that, I could not remember distinctly if they were there at that meeting.

Mr. Bromley. I move to strike out the answer.

Justice STEPHENS. It may go out.

By Mr. STEFFEN.

Q. Did you, Mr. Griswold, draw up a report-

Justice STEPHENS (interposing). Just a moment. Judge Garrett raises a point. He says that technically the answer you moved to strike, Mr. Bromley, was the answer to the Court's question. You meant to move to strike the answer that they were "evidently" there, I presume.

Mr. BROMLEY. Yes, sir.

Justice STEPHENS. That is the answer I intended to rule out.

Mr. Bromley. The answer to Mr. Steffen's question. Justice STEPHENS. Yes.

# By Mr. STEFFEN.

Q. I want your best recollection, Mr. Griswold, without saying "evidently" or "probably"-either yes or no-was Mr. Blagden at the meeting, according to your best recollection?

A. Yes, to the best of my recollection he was. Q. According to your best recollection—yes or no—was Mr. Shearer at the meeting?

A. Yes.

Q. And according to your best recollection—yes or nodid Mr. Avery appear at the meeting at some time?

A. Yes, at some time during the meeting.

Q. Now, I would like to ask you what Mr. Blagden or Mr. Shearer or yourself may have said to Mr. Avery concerning the licensing agreement.

Mr. Bromley. Could I ask this preliminary question, Your Honor?

Justice STEPHENS, Yes.

Mr. Bromley. Is your recollection based on the document, or outside the document, the letter, I mean?

The WITNESS. This letter here, do you mean?

Mr. BROMLEY. Yes.

The WITNESS. No, I have a very distinct recollection that they were at that meeting, and this was evidently the. meeting that they were present at.

Justice Stephens. I don't understand you, Mr. Griswold. I thought you had been testifying all along, 758 up until these last three questions, that you had no independent recollection of who was present, except that wall board manufacturers were present, but that you took it from this writing in front of you that those persons were there. Now you say you have a recollection.

The WITNESS. Well, naturally, Your Honor, in reading these papers they bring back things to my mind. It is pretty hard for me to remember without something to refresh my memory, and after reading them it occurs to my mind that these gentlemen were there, and if they were not there I wouldn't have so reported to the president of our company.

Mr. Bromley. I move to strike out the answer. It is perfectly apparent what the basis of his answer is.

Justice STEPHENS. I am sorry, Mr. Steffen, but it seems to me perfectly clear that this witness is not testifying from his own recollection; that he honestly wants to remember if he can, and he believes that the letter states the facts, but that he has no independent recollection of who was there at all, except possibly as to Avery and Blagden. I think the answer ought to go out.

Mr. STEFFEN. Well, as to Avery and Blagden, it may be, I should think, admitted.

Justice Stephens. It may remain as to Avery and Blagden—otherwise, not.

759 Mr. STEFFEN. Now might I interrogate the witness further in regard to Mr. Shearer's presence?

Justice STEPHENS. Yes.

By Mr. STEFFEN.

Q. When you first answered concerning Mr. Shearer, Mr. Griswold, you said "evidently" that he was there. Can you now, after reading your answers, and the reading of this paper, independently, apart from the paper entirely, remember anything that transpired which would fix Mr.

Shearer as having been present at that meeting?

A. There is one instance that I remember that I am sure was at this meeting, and that was the fact that we got Mr. Shearer and Mr. Avery to meet. They hadn't been meeting very often in the past, on account of a certain feeling that they had toward each other, and this was the first time they had gotten together, and that impressed itself on my mind.

Q. Now I ask you, what did Mr. Blagden, or Mr. Shearer, say to Mr. Avery in regard to the licensing agreement, if

you remember?

A. I do not remember.

Q. Did you ask Mr. Shearer or Mr. Blagden, or any other representative who might have been present, what their attitude toward taking out a license with Mr. Avery might be?

Mr. Adams. I respectfully object to that on the same grounds that I mentioned before, insofar as the question refers to any other representative present.

Justice STEPHENS. I am sorry, I don't understand that objection; Mr. Adams.

Mr. Adams. Well, as I recall the question I think he said: Did you ask Mr. Blagden or Mr. Shearer, or any other representative, what their attitude would be?

Justice Stephens. The question may be stricken as to that particular phrase.

Do you recollect anything said by Mr. Shearer, Mr. Avery,

or Mr. Blagden on this subject, and if so, state it?

Mr. Steffen. I think he has answered that question, that he does not remember.

Justice STEPHENS. I am sorry.

The WITNESS. No, I do not remember at this time.

Justice Stephens. Perhaps I did not understand your question correctly.

Mr. STEFFEN. My next question was whether he polled the members present, and I will restrict that to Mr. Shearer and Mr. Blagden, as to their attitude toward taking out a license agreement with Mr. Avery and the United States Gypsum Company.

Mr. BROMLEY. I object to that as calling for a conclusion.

Justice STEPHENS. I think that objection is well taken. You should ask what the witness said to these gentlemen.

Mr. Steffen. May I say, Your Honor, that he has testified that he does not recollect what they said.

Justice STEPHENS. Well, I don't mean that he is required to repeat the words, but he should tell the substance and effect of what was stated by him on that subject, if anything.

By Mr. STEFFEN.

Q. Can you answer the Court's question, Mr. Griswold? To the best of your recollection, what was the substance and effect of anything that Mr. Blagden may have said to Mr. Avery concerning the possibility of taking out a license agreement?

Mr. BROMLEY. I object to that.

Mr. OLIVER. I object to that also. There is no showing that he was present when such a discussion may have taken place.

Mr. Steffen. I am asking whether he recollects that there was anything said to Mr. Avery, and the substance and effect of what was said.

Justice STEPHENS. Well, I think in that particular question you asked what was said. Of course if he wasn't present at the conversation between Mr. Avery and Mr. Blagden, he couldn't tell it.

Were you present at a conversation between Mr. Blagden

and Mr. Avery on this subject?

The WITNESS. I could not remember of being actually present when any conversation between the two took place.

Justice STEPHENS. Then that will have to go out.

762 By Mr. STEFFEN.

Q. I will refer you again, Mr. Griswold, to paragraph 2 of the exhibit, and ask you if that refreshes your recollection concerning what took place at the meeting, and ask this specific question: Did you poll the members present, Mr. Blagden and Mr. Shearer, as to whether they would take out a license agreement with Mr. Avery?

Mr. Bromley. That is objected to as calling for a conclusion.

Justice STEPHENS. What do you mean by "poll"?

Mr. STEFFEN. I mean-

Justice STEPHENS (interposing) Did he ask them?

Mr. STEFFEN. Did he ask them what their attitude would be as to taking out a license with Mr. Avery? It does not seem to me to be asking for a conclusion. Perhaps every question does in some measure.

Justice STEPHENS. Well, it depends upon whether the witness understands what you mean by the word "poll", I suppose. But I should think you might better ask the question, whether or not he asked these gentlemen, whether or not he remembers asking them.

By Mr. STEFFEN.

Q. Do you remember having asked the members present, or polled them, as to what their attitude would be toward taking——

763 Mr. Adams (interposing). Are we just limiting that to these two members?

Mr. Steffen. I should like to ask that it have to do with the two members that are fixed as being there. We have also fixed that there were other members present whose names Mr. Griswold does not remember, but which would become important. It would indicate that a number of members in the industry were apparently all together in one meeting with Mr. Griswold. We have not been able to fix the names of those members present.

Justice Stephens. I think the Court is obliged to rule, Mr. Steffen, according to orthodox principles of examination, that you cannot ask this witness to testify as to what was said by people or to people whom he can't even, in the most indefinite manner, identify or remember as having been present. Adverse parties are utterly helpless under those circumstancs to meet such testimony. You may ask him if he recollects asking Mr. Blagden or Mr. Shearer, whom he now says he does remember as being present, questions on the topic of this license agreement, but I will have to rule against you on the balance.

Mr. STEFFEN. Well, I will ask my question, then, limiting it to Mr. Blagden and Mr. Shearer.

By Mr. STEFFEN.

Mr. Bromley. I object-

Justice STEPHENS (interposing). For the benefit of the Court, won't you tell me what you mean by the word "polled"?

The WITNESS. Whether I asked them the question, and whether they were in favor of it or not.

Justice STEPHENS. I see. The witness understands it, and he may answer if he recollects.

By Mr. STEFFEN.

Q. Did you ask Mr. Blagden or Mr. Shearer what their attitude would be toward taking out a licensing agreement

with United States Gypsum?

A. I don't think I did; it wasn't necessary. Mr. Blagden already had the matter up with United States Gypsum Company, and I think Mr. Shearer did at that time. I might have asked them what their opinion was at the time, but I don't remember, as to those particular people.

Q. I refer particularly with regard to the time at which you testified Mr. Avery was present at the meeting. Was there an expression of opinion, of which you can now recall the substance and effect, by either Mr. Shearer or Mr. Blagden, as to what they would do, or whether they would take out a licensing agreement, what their attitude would

65 be toward taking out licensing agreement?

A. Well, I don't remember with reference to those two, because they already had negotiations with the United States Gypsum Company.

Q. Had Mr. Shearer at that time?

A. I think he had. At that time I think the Universal was under some kind of a discussion with the U.S.G., I am not too sure, it is too far back.

Q. Do you recall whether you prepared a letter, addressed to Mr. McCrady, in which you set down what transpired at the meeting at Chicago? You can answer that yes or no.

A. Yes, I did.

Q. Have you examined Government's Exhibit 103, and

is that a letter which you wrote?

A. Well, it is an unsigned letter. There is a stamp on it with my signature, but my initials are over in the corner, placed there by the stenographer.

Q. Will you state whether or not you can identify that

as a letter which you wrote?

A. I would say that it was, yes, sir, that I wrote this letter.

Q. Could you state whether or not the second paragraph of that letter was a correct statement of facts as you understood them?

Mr. Adams. I object to that. There is nothing in respect to this letter, and in any event such a statement would not be binding on any of the persons referred to therein, if any.

Justice STEPHENS. Well, the Court is not advised as to what counsel for the Government are attempting now. Perhaps this is an offer of something under the doctrine of "past recollection recorded," as distinguished from "present recollection refreshed." If so, the witness can state whether it is a correct statement of his recollection at that time, if he has any. I don't know, myself, what is in the document.

# By Mr. STEFFEN.

Q. Can you state now to the Court whether or not you correctly recorded the facts as you understood them when

you wrote or prepared the second paragraph of that letter?

A. Yes.

Mr. Bromley. I object to that as incompetent and move to strike the answer. How can he possibly say that when he says he has no recollection?

Mr. STEFFEN. I would say that he now testifies, and has answered yes, that that was a correct statement. He may have no present recollection of those facts.

Mr. OLIVER. May I observe that he simply said that that was an unsigned letter, with his initials on it, and that they had undoubtedly been put there by the stenographer, and that is all he said:

Justice Stephens. Let me see this exhibit, please. (The exhibit referred to was handed to the Court.)

Mr. STEFFEN. Your Honor, may we have a brief recess at the moment?

Justice Stephens. Is there any objection to a recess?

Mr. BROMLEY. No. sir.

Justice Stephens. We will recess for five minutes.

(At this point a five-minute recess was taken, after which the proceedings were resumed.)

Justice Stephens. Let the Court confer informally with counsel.

(There followed an informal conference between counsel and the Court at the bench, not recorded.)

By Mr. STEFFEN.

Q. Mr. Griswold, I want to refer again to the meeting to which you have testified as having been held at Chicago, at which Mr. Blagden and Mr. Shearer and Mr. Avery and yourself were present, and I will ask you this question. Did you ever prepare a report of what transpired at that meeting?

A. As I remember, I reported to Mr. McCrady, the

president of the company.
Q. You reported to Mr. McCrady, the president of the company?

A. Yes, sir.

Q. And did you do that soon or at some later time after the meeting? 768

A. Well, I couldn't say without referring to some letters, but I imagine it would be very soon after the meeting.

Q. Can you say, without using the word "imagine,"

whether it was soon? Will you look at the letter?

A. I would say it was soon after the meeting.

Q. I show you Government's Exhibit 103, and ask you if you can identify that as the report which you made

to Mr. McCrady.

A. My opinion is that that is a copy of the report I made. This is evidently a copy of the letter, but my signature is not on it. That is my recollection or my opinion, that this is a copy, because I did report to Mr. McCrady as to such a meeting, I remember that distinctly.

Q. Can you say whether or not you made a correct report to Mr. McCrady of what transpired at the meeting, as you understood the facts at the time you made the

report?

A. As I understood the facts at that time, and as I

remember, I did make a correct report of it.

Q. And have you examined Exhibit 103, and does that state the facts as you understood them, or does it not?

A. You mean the whole report, the whole letter?

Q. That is correct. A. I would say yes.

Mr. STEFFEN. I offer Government's Exhibit 103 in evidence.

Justice STEPHENS. The rule which I referred to, of "past recollection recorded," requires the production of the original if it is available. You should produce the original, if you can, or else show that it is unavailable.

By Mr. STEFFEN.

Q. Is Mr. McCrady alive, Mr. Griswold?

A. No, sir.

Q. When you prepared your report and letter to Mr.

McCrady, was there a carbon copy made?

A. Well, that was the custom. Of course I couldn't say in this particular case, but I presume there was, that was the rule, the way we handled the correspondence.

Q. And in the ordinary course, what would become of

the carbon copy?

A. Well, it would be put in the files of the company, showing the correspondence with each individual.

Mr. Steffen. I make the point, Your Honor, that if it is a carbon copy and an actual recording, I should think this would record the evidence of what transpired as clearly

as the original, and we have been unable to get the original, and we have subpoenaed all the defendant companies for all papers.

Justice STEPHENS. You have tried to get it?

Mr. STEFFEN. Yes.

Mr. Bromley. You haven't subpoensed McCrady Brothers Company, who might have the original, have you, sir?

Mr. STEFFEN. We have not subpoenaed the McCrady Brothers.

Justice STEPHENS. The rule I was referring to states that "where the witness adopts the memorandum as a record of past memory, the original memorandum, if available, must be produced and not merely a copy of it." Of course that is the "best evidence" rule.

I raise the point because the events are so long ago that it is only proper that, for the protection of the Court and all concerned, we should be sure we are dealing with dependable evidence. The witness may not be in a position to verify the correctness of that copy, since he has no independent recollection of what occurred, but he is just simply saying that he supposes that it is a true copy, he does not know that it is a true copy.

Mr. STEFFEN. Your Honor, may I say something on that score?

Justice STEPHENS. Yes.

Mr. STEFFEN. He has testified to the meeting in Chicago; he has identified many of the things that are in the body of the agreement; he has testified that he made a report to Mr. McCrady, and he has testified that the carbon copy would be filed; he has identified that as a carbon copy of the report that he made.

Mr. OLIVER. May I add that he has not.

Justice STEPHENS. One at a time, gentlemen; I can't hear two people at once.

Mr. STEFFEN. The letter is addressed to Mr. McCrady, not to McCrady Brothers, and Mr. McCrady has long since been deceased.

Justice STEPHENS. Now Mr. Oliver?

Mr. OLIVER. The witness has not yet said that the document in front of him is the report he made. He said it was his opinion that it was.

Justice STEPHENS. I am afraid that is true, Mr. Steffen.

Mr. Steffen. I think, at one or two places, he has already said that that was the report that he made.

Justice STEPHENS. Read the last two or three answers, Mr. Reporter.

Mr. STEFFEN. I can ask him now, if you would like.

Justice STEPHENS. All right, that possibly will save time.

By Mr. STEFFEN.

Q. Mr. Griswold, we want to know whether or not that is a correct copy of the report which you testified you made to Mr. McCrady.

A. I could not say that that was a correct copy. It contains many of the things, in fact, all of the things, I said to Mr. McCrady in the report, but there is nothing on

this to indicate that it was my letter or a copy.

772 Usually a carbon copy of a letter isn't filed that way, on that kind of paper. Somebody has made this, apparently.

Q. For purposes of refreshing your recollection, Mr. Griswold, I refer you to page 36 of your testimony taken out at Port Clinton, when this letter was presented to you.

A. My answer then was practically what I say now, that this is a copy. The contents of the letter I remember in a general way, and my opinion is that that is a copy, but I cannot swear that that is an exact copy of my original letter, because there is nothing here to indicate it, and this is not a carbon copy, that has been made from some other, because with our records, the way they were kept, the original sheets were not like that. But the contents I am willing to admit, it was practically the substance of my report to Mr. McCrady, but that is as far as I can go.

Q. And would you say whether or not that report to Mr. McCrady accorded with the facts as you understood them,

at the meeting at Chicago?

Mr. ADAMS. I object to that.

Justice Stephens. Well, he has already answered that he doesn't recollect what happened. We are now in the field of past recollection recorded. I am afraid, Mr. Steffen—the Court wants to give the Government every proper opportunity to develop its case, and realizes the difficulty

the Government is under with respect to aged wit-773 nesses, and that long years have elapsed, but we, as presently advised, think it would be clear error to admit this exhibit, even under the doctrine of past recollection recorded, because he can't identify it even as a carbon copy.

Mr. Steffen. Would Your Honor care to recess for the noon hour.

Justice Stephens. If you have no other testimony that you can go on with at the present time.

Mr. STEFFEN. I would like to come back to this matter of this paper that we just had, Government's Exhibit 103, but I can go on with another matter if you like.

By Mr. STEFFEN.

Q. Mr. Griswold, after this meeting to which you have testified, at Chicago, in about May, May 21, did you report the matter back to the Board of Directors of the American Gypsum Company, do you recollect?

A. Yes, I did.

Justice STEPHENS. Did he do what, Mr. Steffen?

Mr. STEFFEN. Did he report the matter back to the Board of Directors.

Justice STEPHENS. Thank you.

By Mr. STEFFEN.

Q. You recall having reported it back to the Board of Directors of the American Gypsum Company?

A. Yes.

Q. What in general was the substance of the report back to the Board of Directors?

Mr. Bromley. I object to that unless it appears that it was not in writing.

Justice STEPHENS. Unless it appears what?

Mr. BROMLEY. That it was not in writing.

Justice STEPHENS. You should inquire into that Mr. Steffen.

By Mr. STEFFEN.

Q. Did you report orally to the Board of Directors at a meeting?

A. Orally, yes, sir.

Q. What was the substance of your report back to the Board of Directors concerning your meeting at Chicago with Mr. Avery and Mr. Blagden and Mr. Shearer?

Mr. BROMLEY. I object to that as highly incompetent.

Mr. STEFFEN. It is highly competent.

Mr. Bromley. It certainly does not come within the rule of past recollection recorded.

Mr. STEFFEN. We are on a new matter now.

Mr. Bromley. I don't see under what rule it comes.

Justice STEPHENS. It seems to the Court—I will be glad to hear you, Mr. Steffen—but it seems to the Court that his report to the Board of Directors of the American

Gypsum Company is hearsay as to any of these defendants, even if he recollects clearly what he reported, and it is doubtful, in view of his past testimony, that he can be thought to recollect what happened up there because he says he doesn't know who was present except Shearer, Avery, and Blagden. It seems to me that the objection is well taken, but I will be glad to hear you.

Mr. STEFFEN. Well, it would seem that a report by Mr. Griswold, who was, as we have shown, a representative of the American Gyptum Company, concerning a meeting between Mr. Griswold, Mr. Blagden, Mr. Shearer, and Mr. Avery, having to do with a licensing agreement which is the matter which we are going to discuss throughout this trial, would be a very pertinent matter.

Justice Stephens. Well, we always must draw the distinction as to what is pertinent and what is competent. It may be very pertinent, it may be relevant to your case, but the question is whether it is competent. It may be that if you are offering it as a declaration of a co-conspirator, that it will come within the rulings made earlier this morning, but I didn't understand that you were offering it in that category.

Mr. STEFFEN. I definitely am offering it as a declaration of a co-conspirator. I am endeavoring now to bring out the whole Board of Directors of the American Gypsum Company also were acquainted with that declaration, which

would go to show their general statement of mind 776 in understanding and entering this conspiracy, and on that score also it would be admissible as not being hearsay. But I offer it directly as a declaration of a coconspirator.

Justice STEPNENS. On that theory, it may be received, subject to the ruling this morning that it is not received to prove the existence of a conspiracy, and will not be con-

sidered unless a conspiracy is proved aliunde the declara-

By Mr. STEFFEN.

Q. Now, Mr. Griswold, will you tell us what the substance of your oral report back to the Board of Directors of American Gypsum Company was, concerning this meeting at Chicago?

A. It is too long ago, I cannot remember without something to refresh my memory, what I reported in detail.

Q. I show you Government's Exhibit 103, and ask you if that will refresh you as to any matters that you reported back to the Board of Directors.

Mr. BROMLEY. Is this the same letter again, Mr. Steffen?

Mr. Steffen. Yes.

Mr. Bromley. I object to its use in that roundabout fashion.

Mr. Steffen. Well, we insist upon it, Your Honor. It is perfectly appropriate to refresh his recollection as to what he may have reported or did report to the Board of Directors following this meeting.

Justice Stephens. He has testified that it does not refresh his recollection, Mr. Steffen, and that he cannot verify it even as a carbon copy. He says that it is something that has been made up from the records of the company, but is not even a carbon copy. We want to give the Government every proper opportunity to present its case, but I think that would be clear error—objection sustained.

#### By Mr. STEFFEN.

- Q. I show you what has been marked as Government's Exhibit 105 for identification, which purports to be a meeting of the Board of Directors of the American Gypsum Company under date of June 3, 1926, and ask you if you can identify the signatures.
  - A. Yes?

Q. Whose signature is the first signature?

A. J. H. McCrady, president.

Q. Is he alive?

A. No, he is deceased.

Q. What is the second signature?

A. J. B. Davis.

Q. Is he alive?

A. No, he is deceased.

Q. Upon examining that, can you recall having been present at the meeting?

A. I would say that I attended this meeting.

Q. And would you say whether or not that is a correct report of the meeting?

A. Well, I didn't keep the records, but I would suppose

it was.

Q. Well, can you say whether it is or not—I don't care what you suppose?

Justice STEPHENS. Take your time and examine it, Mr. Griswold, and compare it with your own memory, if you have one, as to the events.

By Mr. STEFFEN.

Q. Particularly, Mr. Griswold, as to the last paragraph, is that part of the minutes correct according to your recollection?

A. The last two paragraphs of the letter I remember distinctly of the committee being appointed at a meeting to consult with and continue the negotiations they were already on with the United States Gypsum Company, to continue the negotiations still further.

Mr. STEFFEN. I offer Government's Exhibit 105 in evidence.

Justice Stephens. Submit it to counsel, Mr. Steffen.
(The document referred to was submitted to defense counsel for examination.)

Justice STEPHENS. We will take the noon recess at this time. The Marshal will announce the recess.

779 (Thereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.)

780 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice Stephens. Proceed, gentlemen.

Thereupon, FRANK J. GRISWOLD resumed the stand and testified further as follows:

# DIRECT EXAMINATION (resumed)

Mr. STEFFEN. I believe we had offered Government's Exhibit 105, and it has not been ruled upon.

Justice STEPHENS. Has counsel inspected it?

Mr. OLIVER. I haven't seen it, I would like to see it.

Justice STEPHENS. Let counsel see it.

Mr. KNUFF. That is D-104, Mr. Oliver, in the photostats that were furnished you.

Mr. Steffen. We are offering merely the last paragraph. The signatures have been duly identified. Both signers are dead, and the witness has testified that he was present at the meeting and that the matters referred to in the last paragraph actually took place, which I think overwhelmingly verifies it. It is offered merely for purposes of showing the authority of Mr. Griswold to continue his actions as a negotiator for the American Gypsum Company.

Mr. Bromley. We have only our continuing objection, no other.

781 Justice STEPHENS. Is this to be offered as a declaration—

Mr. Steffen (interposing). Just as proof of authority on the part of Mr. Griswold to continue his negotiations for the American Gypsum Company.

Justice Stephens. Do you object to it in that respect?

Mr. BROMLEY. No. sir.

Justice STEPHENS. It may be received as offered, for evidence of authority on the part of Mr. Griswold to act for the company. So far as it is offered as a declaration of a co-conspirator, it is received subject to the ruling made this morning with respect to that class of testimony. The record shows that it is only the last paragraph you are offering?

Mr. STEFFEN. Yes, that is right.

(The document referred to was marked as Government's Exhibit 105 and received in evidence.)

By Mr. STEFFEN.

Q. Mr. Griswold, I show you Government's Exhibit marked for Identification No. 106, which purports to be a letter from you to Mr. S. L. Avery, under date of June 2, 1926, and will ask you to look it over carefully and examine your signature and tell us whether that is your letter?

Mr. KNUFF. That is D-6 in the photostats that counsel have.

The WITNESS. Yes, I would say that that was a letter written by me to Mr. Avery. It is a stamped signa-

ture, a facsimile of my signature used by stamping the letters that I didn't sign in longhand.

Mr. STEFFEN. I offer Government's Exhibit 106 in evidence as a declaration of a co-conspirator.

Mr. ADAMS. We make the same general objection, and in order to expedite matters perhaps we could have an objection on that general ground, as I think Your Honor indicated this morning we might, to all of these documents as they are offered from time to time.

Justice STEPHENS. The record may show that counsel for the defendants, each of them if they wish, may have recorded an objection to the admissibility, at this stage of the case, of all documents offered as declarations of co-conspirators, and they are received not as evidence of the conspiracy, and subject only to ultimate prima facie proof of the existence of a conspiracy.

Mr. Adams. I take it if there are any other specific grounds that come up from time to time with respect to particular documents, we can indicate that to the Court?

Justice STEPHENS. Yes, you may feel quite free to do that.

Mr. FINCK. May I have a continuing objection to this and all others, as I made it as to Exhibit 104?

Justice STEPHENS. Yes, you may, Mr. Finck.

Mr. Johnston. I assume, if the Court please, that the record will show the same objection on the part of all the other defendants?

Justice STEPHENS. I think there was a stipulation at the outset that an objection made by any defendant would redound to the benefit of all.

Mr. STEFFEN. We agree to that.

Justice STEPHENS. It may be received subject to the

ruling this morning on that class of testimony.

(The letter from Mr. Griswold to Mr. Avery dated June 2, 1926 was marked as Government's Exhibit 106 and received in evidence.)

Mr. STEFFEN. I will read Government's Exhibit No. 106, which purports to be a letter from The American Gypsum Company to S. L. Avery, under date of June 2, 1926.

"Mr. S. L. Avery, President, United States Gypsum Company, 205 West Menroe Street, Chicago, Illinois.

DEAR SIR: I have just returned from Buffalo and while there I had the pleasure of meeting Mr. Haggerty of the

National Gypsum Company.

Mr. Haggerty apparently had not a very complete report on just what happened and was very much interested in hearing the details. When I left him, he admitted being personally sold on the proposition, but, of course, like the rest of us, stated he would have to take up the matter with his Board of Directors for further confirmation.

There is no question in my mind about his attitude, and as he and Mr. Williams control the National Gypsum Company, I feel very sure there will be no opposition from

his directors.

While there I had the pleasure of an interview with Mr. Blagden, who reported that the contracts have been written up, but are being rewritten and it is expected they will be ready to submit in a very short time.

I shall be very glad to receive two copies of this contract, because I want to forward one to the Texas Cement Plaster

Company with any comments I desire to make on it.

It would be very nice if this matter could come up at the time of the next meeting of the Industries, which is on July 13th and 14th.

Yours very respectfully, .

THE AMERICAN GYPSUM COMPANY:
(S) F.J. GRISWOLD"

By Mr. STEFFEN.

Q. Do you recall, Mr. Griswold, whether you received a reply to your letter of June 2 to Mr. Avery, Government's Exhibit No. 106?

A. I do not, without something to refresh my memory

I couldn't say.

Q. I show you Government's Exhibit No. 107 for Identification, and ask you to examine it and then I will ask you a question.

Justice STEPHENS. What number is that here, Mr. Steffen?

Mr. KNUFF. In the photostats it is D-8.

Justice STEPHENS. Thank you.

The WITNESS. There is nothing on this letter to refresh my memory that I received it; and furthermore, this evi-

dently isn't an original, it has been copied from something else. Whether it is a copy of the original letter, I don't know, and if I did receive it I couldn't say.

By Mr. STEFFEN.

Q. I would like to direct your attention simply to the subject matter of the letter. Is there anything in there that refreshes your recollection as to whether you received a reply from Mr. Avery to your letter of June 2, which is Government's Exhibit 106?

A. Yes, I remember the question of the contracts that I had asked for, that Mr. Avery had advised that they

would be mailed sometime later.

Q. What contracts were they, if you remember?

A. They were contracts that I had been advised were being drawn up between the Beaver Products Company, I think it was at that time, and the United States Gypsum Company, for a settlement of their license agreement contract that they were discussing, and I had asked for two copies to send to the Texas Cement Plaster Company, as I recall.

Q. You had asked for two copies, you say?

A. One or two, yes, I had asked for two copies to forward to the Texas Cement Plaster Company.

Q. State again what were those contracts?

A. They were contracts, as I remember it, a duplicate of the proposed contract or license agreement between the United States Gypsum Company and the Beaver Board Company, who had been in litigation and had been trying to settle their disputes, but at that time I don't think they had reached an agreement yet, but they had it under discussion at that particular time.

My object in asking for it for the Texas Cement Plaster Company—Mr. Glovd either had at this time or was going into the plasterboard business, I do not remember just the dates, but I wanted to show him—he also knew of this litigation between the Beaver Board Company and the United States Gypsum Company—and I wanted to show him what had been done, if there had been anything, in the

way of a settlement, or a proposed settlement, so that if he wanted to do likewise he could do so.

Mr. Steffen. I offer Government's Exhibit No. 107 in evidence.

Mr. Bromley. No objection as to competency.

Justice Stephens. No objection as to competency?

Mr. BROMLEY. No, sir.

Justice STEPHENS. It may be received.

(The letter referred to was marked as Government's Exhibit No. 107 and received in evidence.)

By Mr. STEFFEN.

Q. Mr. Griswold, do you recall whether or not, about this time in June of 1926, you talked with Mr. Reeb concerning the licensing agreements?

A. I do not remember without something that would

refresh my recollection.

Q. Who was Mr. Reeb? A. He was President of the Niagara Gypsum Company,

at Buffalo, New York.

Q. Do you recall whether you ever talked with Mr. Reeb concerning the licensing agreement?

A. Yes, I did.

Q. Will you state on what occasion?

A. Well, during 1926, I can't say just what date, but I think Mr. Reeb was in business at that time, and I had helped him build his plant, and he was making a wallboard, I am quite sure, at this date. And

a wallboard, I am quite sure, at this date. And when he first started up the plant, as I remember, he started to make an open-edge or a raw-edge board; and as usual, he had so much trouble with it, and the opposition in the trade in selling it, that he had told me about it. So I offered or volunteered to let him use this Clark patent, without a license, if he wanted to make what was afterwards claimed by the United States Gypsm Company to infringe on the Birdsey patent, but I offered to let him use this patent.

Justice STEPHENS. Let me see what the question is. Read the question.

(The question was read by the reporter.)

Justice STEPHENS. Mr. Gřiswold, we appreciate your help here, but please pay a little more strict attention to the question, and answer just the question that is asked you. If counsel wants to find out about other things, he will frame a question; otherwise, we will get so much in the record that we may not need.

By Mr. STEFFEN.

Q. Do you recall on what occasion or on what time you met with Mr. Reeb and talked about the licensing?

A. No, I do not, I couldn't state any specific date.

Q. I show you what has been marked Government's Exhibit 108, which purports to be a letter from you to 789 Mr. Avery, under date of June 16, 1926, and ask you to read it carefully and examine the signature and tell the Court whether it is your letter?

Justice STEPHENS. What number is that, Mr. Steffen?

Mr. KNUFF. That is D-7.

The WITNESS. I would say yes, that is American Gypsum Company stationery, and that is my stamp, a facsimile of my signature.

By Mr. STEFFEN.

Q. Could you say whether or not you and Mr. Reeb went to Chicago, as recited in that letter?

A. I remember we went to Chicago, but I don't remember

whether this was the date or not.

Q. Did you go down more than once with Mr. Reeb to see Mr. Avery?

A. Yes, as I remember it, we did, we were there more

than one time.

Q. And the subject of your conference with Mr. Avery

was what?

A. It was to try to get an adjustment between the Niagara Gypsum Company and the United States Gypsum Company for the damages for past infringement on this Birdsey type edge, which I had allowed Mr. Reeb to manufacture.

Q. Did you get a settlement with the United States

Gypsum Company, or did Mr. Reeb?

790 A. Well, we didn't get it at this time, but later on it developed.

Mr. Steffen. I offer Government's Exhibit 108 in evidence.

Justice STEPHENS. Is there any objection?

Mr. BROMLEY. No objection.

Justice Stephens. This is offered, I suppose, as another declaration?

Mr. Steffen. Offered generally, as a declaration, and furthermore for the purpose of showing that Mr. Avery was acquainted with the negotiations that Mr. Griswold had been having with Mr. Reeb.

Justice STEPHENS. Well, technically I suppose to prove that you would have to show that the letter was mailed to Mr. Avery in the usual course, so that we can presume that he received it.

It may be received as a declaration, subject to the usual ruling. I do not think it is so far pertinent to prove that Mr. Avery received it.

Mr. STEFFEN. This is a matter, Your Honor, that will come up in a number of these cases. This letter is on Ameriman Gypsum Company stationery, it was taken from the files of the United States Gypsum Company under subpoena, and no objection has been made-

Justice STEPHENS (interposing). If that fact is not disputed I think there would be no question. 791 Do you dispute that this was received by Mr. Avery?

Mr. BROMLEY. No. sir.

Justice STEPHENS. Very well, the Court's objection may be withdrawn, and the letter may be received as a declaration and to prove notice to Mr. Avery of the contents thereof.

(The letter from Mr. Griswold to Mr. Avery, dated June 16, 1926, was marked as Government's Exhibit 108 and

received in evidence.)

# By Mr. STEFFEN.

Q. Mr. Griswold, did you ever examine the contracts which you wrote to Mr. Avery to obtain, either when he sent them to you or had you seen them previously?

A. Well, I would say yes, that I did, at some time or

other, I don't remember the date that I received them or

examined them.

Q. Did you ever receive a copy of the contract which was drawn up between Beaver Board and USG, the original Beaver contract?

A. Yes, I saw what was reported to me to be a copy and

I presume it was a copy of the original.

Q. And did that copy refer to a number of patents?

A, I do not remember whether that particular one referred to a number of patents, but there were a number of patents that were later referred to, but whether at this time or not I could not say.

Q. Did you familiarize yourself with the patents, any patents, that were included in the original contract between Beaver and USG?

\* A. I don't remember of any, in particular, outside of the Utzman patent and the Birdsey patent. Those are the ones that my company was primarily interested in. The rest of the patents were not involved in our case at all, and there had never been anything claimed on them. Whatever they were, I don't remember now, but we were not interested.

Q. Did you ever request to be furnished with a list of patents?

A. Yes, I did.

Q. I show you Government's Exhibit 109, which purports to be your letter to Mr. Avery under date of August 13, 1926, and ask if you can identify it as your letter?

Justice STEPHENS. Is that D-9?

Mr. KNUFF. That is correct.

The WITNESS. I would say that that is an original letter, it is American Gypsum Company stationery, and it is my stamp with my facsimile signature.

Mr. STEFFEN. I offer Government's Exhibit 109 in eyidence.

Justice STEPHENS. It may be received subject to the same restrictions as made this morning on this class of evidence.

(The letter from Mr. Griswold to Mr. Avery, dated August 13, 1926, was marked as Government's Exhibit 109 and received in evidence.)

# By Mr. STEFFEN.

Q. Do you recall whether you received a reply from Mr. Avery to your request for the patents, made in Government's Exhibit 109?

A. I do not remember.

Q. I show you Government's Exhibit 110, which purports to be a copy of a letter to Mr. F. J. Griswold, with the type-written word "President," only, at the bottom, and ask you to examine it carefully and state whether you received a letter of that character?

Justice STEPHENS. Is that D-10, Mr. Knuff?

Mr. KNUFF. D-10, yes, Your Honor.

The WITNESS. Yes, I would say that I received that letter.

Mr. Steffen. I offer Government's Exhibit 110 as a declaration of a co-conspirator.

Justice STEPHENS. Is there any objection except the general objection to this class of testimony?

That is a letter which purports to be from the United States Gypsum Company to Mr. Griswold?

794 Mr. STEFFEN. Correct.

Justice STEPHENS. It may be received subject to the objections and restrictions made this morning with respect to this class of testimony.

(The letter to Mr. Griswold referred to, purporting to be from USG, was marked as Government's Exhibit 110 and received in evidence.)

By Mr. STEFFEN.

Q. Now, Mr. Griswold, I believe you have testified that you received copies of these agreements. Do you recall whether they were ever presented to the Board of Directors of The American Gypsum Company?

A. Yes, they were.

Q. I show you Government's Exhibit 111 for Identification which purports to be a copy of the minutes of the Board of Directors of The American Gypsum Company held on August 16, 1926, and ask you if you can identify the two signatures at the foot thereof?

A. Yes.

Q. What are the signatures?

A. J. H. McCrady, President; J.B. Davis, Secretary.

Mr. KNUFF. That is D-105 in the photostats.

Mr. STEFFEN. I offer in evidence the next to the last paragraph on the first page of Exhibit No. 111.

Justice STEPHENS. Submit it to counsel, unless they have it. Perhaps they have already seen it.

Mr. STEFFEN. I will read that paragraph:

"A copy of the proposed Licensing Agreement, as suggested by The United States Gypsum Company was read in detail and after a full discussion by the Board, Harry W. Benn moved that this entire matter be again referred to the Committee, consisting of J. H. McCrady, F. J. Griswold and J. B. Davis, for a general revision as to details, and that the Committee endeavor if possible to limit any licensing agreement to a three year period; and further, that C. F. Miller is by this motion appointed an alternate to serve upon the above Committee in case any one of those noted are unable to attend its sessions, motion seconded by Edward McCrady and unanimously carried."

Justice STEPHENS. It is received subject to the ruling made this morning with respect to this class of testimony. (The paragraph of the Minutes of American Gypsum

Company of August 16, 1926, read by Mr. Steffen, was

marked as Government's Exhibit 111 and received in evidence.)

By Mr. STEFFEN.

Q. Now, Mr. Griswold, the Minutes recite that there was a motion made that the Committee "endeavor if possible to limit any licensing agreement to a three year period". Do you recall that action, or the

reasons for that action, rather?

A. Well, as I remember the reason for it, it was that during the interim we had learned that the Utzman patent expired in about 3 years, and we didn't want to obligate ourselves at that time, at this particular time, to pay royalties beyond that time, and especially so since at this particular time the question of who had the final priority on the Birdsey and the Clark patents hadn't been decided, and so we didn't want to go beyond the expiration of the Utzman patent.

Q. Was there any other objection made to continuing

the contract beyond 3 years?

A. Well, I don't remember offhand without something to refresh my mind, but I do remember that particular

phase of it.

Q. And the Utzman—I think it is a matter of record that the Utzman closed-edge patent expired on August 6, 1929, which was almost 3 years from the time of this meeting.

A. Yes.

Q. I now show you Government's Exhibit 112 for Identification, which purports to be a letter from you to Mr. Avery, dated August 17, 1926, the day after the Board of Directors meeting, and ask you if you can identify it as your letter?

A. Yes, I would say that that was the original

letter, with my stamped signature.

Mr. Steffen. I offer in evidence Government's Exhibit 112.

Justice STEPHENS. Received, subject to the restrictions made in this morning's ruling with respect to this class of testimony.

(The letter from Mr. Griswold to Mr. Avery, dated August 17, 1926, was marked as Government's Exhibit

112 and received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit 113, which purports to be a letter from you to Mr. S. L. Avery under

date of August 31, 1926, and ask you to read it and examine your signature, and state whether or not it was your letter?

A. That is my stamp, a mimeograph of my signature, but this isn't the stationery that we used in our office at that time. It is evidently a copy, copied on some different stationery, because I have no recollection of using any perforated stationery like that; and besides, this evidently was taken from the United States Gypsum Company's file, that might account for it, but that is a facsimile of my stamped signature.

798 Q. You say it is?

A. Yes.

Q. Do you remember anything concerning the contents of the letter which might help you to identify it?

Mr. BROMLEY. We received it; Mr. Steffen.

The WITNESS. The last paragraph here I remember. It says I met Martin Johnson. I remember that at some meeting, I couldn't say which, that I had met him at about that time, which is the first time that I think I had come in contact with him.

Mr. Steffen. I offer Government's Exhibit 113 in evidence.

Justice STEPHENS. That may be received in evidence, subject to the restrictions made on this class of testimony in the ruling this morning.

The letter from Mr. Griswold to Mr. Avery, dated Aug. 31, 1926, was marked Government's Exhibit 113 and re-

ceived in evidence.)

Mr. STEFFEN. I will read the third paragraph of Gov-

ernment's Exhibit 113:

"While at Buffalo I had an interview with Mr. Haggerty. At New York I also met Mr. Fuller of the Atlantic Gypsum Company. Had a very pleasant talk with him along the lines we are working on and expect another interview with him in the very near future."

### By Mr. STEFFEN.

Q. What Mr. Haggerty did you refer to, Mr. Griswold?
A. Connected with the National Gypsum Company,
President at that time.

Q. And who was Mr. Fuller?

A. Mr. Fuller was the Secretary of a new company that had been organized to build a plant at Portsmouth—I don't

remember even in what State it was-but it was Ports-

mouth, New Hampshire, I guess.

Q. I show you Government's Exhibit No. 114, which purports to be a letter from you to Mr. S. L. Avery, under date of September 8, 1926, and ask if you will read it, please, and state whether or not it is your letter?

I might say that those perforations along the side were

put in by us.

A. Well, that is my stamped signature with a facsimile of my signature on it. I remember of writing Mr. Avery that Mr. McCrady and I would be in Chicago, and afterwards we had to postpone the meeting on some account, I don't remember now.

Mr. STEFFEN. I offer Government's Exhibit No. 114.

Justice Stephens. Do you concede receiving that?

Mr. BROMLEY. Yes, Your Honor.

Justice Stephens. It may be received, subject to the ruling this morning with respect to this class of testimony.

(The letter from Mr. Griswold to Mr. Avery, dated Sept. 8, 1926, was marked as Government's Exhibit 114 and

received in evidence.)

801 By Mr. STEFFEN.

Q. I show you Government's Exhibit No. 115, which purports to be a copy of a letter addressed to you under date of September 10, 1926, and ask you if you can

identify it.

A. I have a recollection of receiving a letter from Mr. Avery advising us that he would be there to meet Mr. McCrady and myself on a certain date, but I don't remember whether this is the letter or not. It evidently is a copy of it.

Mr. Steffen. I offer Government's Exhibit 115 in evidence.

Justice STEPHENS. Is there any objection?

Mr. BROMLEY. None, other than the general one.

Justice STEPHENS. It may be received, subject to the general objections to this class of testimony.

The document referred to, marked Government's Ex-

hibit No. 115, was received in evidence.)

# By Mr. STEFFEN.

Q. I show you Government's Exhibit No. 116 for identification, which is an unsigned copy of a letter addressed to Mr. J. H. McCrady, under date of September 17, 1926, and ask if you can identify it from reading it, that it is your letter?

A. There is nothing on this that I could identify it by, except as I remember some of the things that hap802 pened. Mr. McCrady was on this committee with me, and he and I did more than the other member who didnt' take much active part in it, and we were the ones that did most of the work in trying to arrive at a settlement with Mr. Avery; and apparently—

Justice STEPHENS (interposing). Just a moment, Mr. Griswold. You are going far beyond the limits of the question. We don't mean to be technical with you, but the reason we require witnesses to answer just the questions asked them is because the lawyers know what is really relevant under the issues of the case. Now, just listen to the next question and answer that question.

### By Mr. STEFFEN.

Q. Are those your initials on the side, there?
A. Those are my initials in the corner there.

Q. And is it true that you had a talk with Mr. Shearer concerning the contracts, as expressed in the second paragraph?

A. I do not remember. This letter says that I did not

see him, that he didn't come back to the hotel.

Q. You say he did not?

A. That is right.

Q. Do you have any recollection of it?

·A. I have not; the letter states that he did not come back.

Q. Do you recall whether you talked to him over the telephone?

803 A. I do not recall that.

Q. Can you say now, Mr. Griswold, whether or not you wrote this letter, or whether you can identify this copy or not?

A. Well, I would say that I wrote the letter, but I couldn't positively identify that as a copy of it, but that I wrote a letter along those lines, I will say that I did that.

Mr. STEFFEN. I offer Government's Exhibit 116.

Mr. BROMLEY. In addition to the general objection, I cbject to it as incompetent, because of no proper foundation.

Justice STEPHENS. It seems to me that the letter is unnecessary. The witness testified that he wrote a letter along those lines.

Mr. STEFFEN. 'We will withdraw the offer.

Justice Stephens. It may be withdrawn.

(The letter referred to, marked Government's Exhibit 116 for identification, was withdrawn.)

Mr. Bromley. Does that still have a number for identification?

Justice STEPHENS. If an exhibit is withdrawn, the number ought to be released from the record, I should think, so that we will not have a lot of blanks in the record.

Judge Garrett is a little indefinite as to whether, if you wish the answer to remain that he wrote a letter 804 along those lines, the record will show, without the presence of the letter, along what lines he means. If he has an independent recollection you could bring that out, of course. Apparently the letter refreshes his recollection; therefore, you can have him testify as to that.

Justice GARRETT. "Along those lines" doesn't mean anything unless we know along what lines he means.

Justice Jackson. The lines of your question, I take it.

Mr. Steffen. My question was very broad, just asking him if he wrote the letter, and he answered that he wrote one along those lines, but there is nothing in the record to show what the letter says.

We would like to re-offer Government's Exhibit No. 116 as showing, or as recording, Mr. Griswold's understanding

at the time that the letter was written.

Mr. Bromley. Objected to as incompetent.

Justice Stephens. Is that the letter of September 17, 1926?

Mr. STEFFEN. Yes.

Justice STEPHENS. I don't see—the Court doesn't see—how it can come in as competent in view of the testimony of the witness that he cannot state whether that letter was sent or not. He says he remembers writing a letter along those lines, he doesn't say what lines, but he distinctly said

that he couldn't identify that letter as having been written by him. It would seem to me to be incompetent as not having been proved to be his letter,

and it so ruled.

(The letter referred to, re-offered as Government's Exhibit No. 116 for identification, was excluded.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 117; which purports to be a letter from J. H. McCrady, addressed to J. B. Davis; under date of September 20, 1926, and ask you simply whether you can identify the signature.

A. Yes, I would say that was J. H. McCrady's signature.

Mr. Steffen. I offer Government's Exhibit 117 in evidence as the declaration of a co-conspirator.

Mr. ADAMS. I object to it on the ground that no proper foundation has been laid.

Mr. STEFFEN. It is in evidence, Your Honor, that Mr. McCrady is dead, and Mr. Davis is dead, and that Mr. McCrady was president of the company and a member of the committee, and that Mr. J. B. Davis was secretary of American Gypsum Company and a member of the committee.

Mr. Adams. All we have is a signature; we have no way of knowing whether he actually wrote the letter, and whether the letter is in the form in which he wrote it, or anything else about it. All we know about this letter is that it has the signature of a man that is now dead.

Justice STEPHENS. Are you familiar with the handwriting of Mr. McCrady?

The WITNESS. Yes, I knew Mr. McCrady's signature.

Justice Stephens. Is that an original letter?

Mr. STEFFEN. It is an original letter, taken from the files of The Celotex Company.

Justice STEPHENS. I should think the objection would go to the weight, Mr. Adams, if the witness can identify this as Mr. McCrady's signature.

Mr. Adams. But that is all he can do. All he can do is say that as far as that is concerned, it is the signature of a man now deceased. Whether or not that letter is the letter that the man wrote, we have no way of knowing whatever, we have no way of knowing whether it was ever communicated to the man to whom it was addressed. I raise no question about the signature at all, but—

Justice STEPHENS (interposing). Let me read the letter.

Mr. ADAMS. I am sorry.

Justice Stephens. Does the record show who Mr. Davis was?

Mr. Steffen. Yes, he was the secretary of the American Gypsum Company.

Mr. ADAMS. May'I make this further observation, Your Honor?

Justice STEPHENS. The record shows, does it not, that Mr. McCrady was a member of McCrady Brothers Company, but was also a director of the American Gypsum Company?

Mr. STEFFEN. Yes.

Justice STEPHENS. Go ahead, Mr. Adams.

Mr. ADAMS. I want to make this observation to emphasize my point. It may be, and no doubt is, true that Mr. McCrady's signature appears on this paper. He may have signed a blank piece of paper and someone else may have typed in everything that is above it; he may have never dictated it. He may, during his lifetime, have known nothing about it. There is no evidence whatever that this is the product of the mind of Mr. McCrady. The sole fact that we have in this courtroom is that Mr. McCrady's signature appears upon a piece of paper. Anyone could have put in what comes above the signature. Therefore, I say it is without any foundation whatever.

Justice Garrett. Mr. Adams, I would like to ask you this. It seems to me you advance a somewhat novel proposition here. Here is a typewritten instrument, purporting to be the original, on the stationery of McCrady Brothers Company, whose existence has been shown here, and you say that, although conceding the signature, that is not sufficient to prove that it was actually his work?

Mr. ADAMS. Yes.

who signed it?

Justice Garrett. Isn't there something novel about that? I am thinking now in terms of wills, just as an illustration, where the witnesses to a will have died and persons are called—or at least in jurisdictions with which I am familiar—to prove the signature of the witnesses and the signature of the person signing it. Doesn't that always carry with it the idea that the document to which the name is signed was the document of the persons

Mr. ADAMS. There is no question about it, Your Honor, but that, I think, is because of the special rule having to do with the law of wills, where the attestation clause recites that the testator, in the presence of the witnesses, declared that the will was his last will and testament; and then, because of the fact that people are not immortal, the law declares that you can later prove the signature of a witness to that attestation clause, and that that proves that it was the document of the testator.

Now, I don't purport to be an expert on the law of wills,

but that is the way I understand the law.

Justice GARRETT. It may be that you are quite right, it just struck me as a bit novel, and that was the first illustration that came to my mind.

Mr. ADAMS. I don't, if I may respectfully differ from Your Honor, see anything novel here other than the Government has suggested that this should go into evidence without more proof. The rules of evidence with respect to documents, it seems to me, require that a document be

identified by some person who made the document or who created the document, or who is in a position to know that the document was created by someone

else.

Now, all that we have in this courtroom is that this was signed by someone, and we concede the signature, but I think my illustration still holds good, that anyone might, for all we know to the contrary, have picked up a piece of stationery of this company and have typed something in above the signature. The stenographer is not called to say that Mr. McCrady dictated it to her. Mr. McCrady cannot be here. There is no way of knowing whether that is actually what he dictated or whether it is not.

Your Honors might speculate on that, I might speculate myself, but in the absence of proof, which is not present

here-

Justice STEPHENS (interposing). Mr. Adams, as we are presently advised, we think your objection goes to the

weight of the letter, rather than to its competency.

Now, we will not foreclose you from pursuing this further. If you can show us some authorities which will support your view, we will hear them, but here is a letter on which the signature of Mr. McCrady is identified by a man who knew him in his lifetime, and knew his signature. Of course a document must be identified, but it can be

identified by circumstances as well as by a witness, and it bears the letterhead of Mr. McCrady's company, 810 as testified to by the witness, and it deals with the subject-matter which the witness states he was on

the committee with Mr. McCrady to discuss.

It seems to us that circumstantially it is given such credence as to be entitled to admission. Of course, if you can show that it was forged, you are entitled to show that.

Mr. Adams. I don't think, if I may say so, that there is any burden on me to show that it was forged. Your Honor is taking internal evidence, if I may say so, to prove the fact we are trying to prove. You say that because the letter relates to something that is in issue here, that therefore you can say that it is the letter that this man wrote. I seems to me that that is assuming the object of the debate, and I don't want to labor this further, but I cannot see how we can possibly admit in evidence here, accept anything here, which might be forged. It isn't my burden to prove that this might be forged. It is the burden of the Government to show that this is a letter written by Mr. McCrady, and the sole fact here is that it is Mr. McCrady's signature on the letter.

Justice STEPHENS. It seems to us that the fact that Mr. McCrady's name is on it, and that it is on the letterhead of his company, is some evidence that he wrote it, at least sufficient evidence to qualify it for admission. If you want to attack it, you are entitled to do so. If you want to present

authorities tomorrow morning, to show that the 811 letter cannot be introduced in evidence, we will hear them. For the time being it is received.

(The document referred to, marked Government's Exhibit No. 117, was received in evidence.)

Mr. STEFFEN. I should like to read the second paragraph

of Exhibit No. 117, just admitted by Your Honor:

"Now in regard to our conference in Chicago with Mr. Avery, I am not going to enter into details or even hit the high spots as I had C. F. Miller on the 'phone about an hour ago and he advised me that he had written you as to what transpired in our conference with Mr. Avery. He gave us to understand that for the next ten years, we, the American Gypsum Company, would have to eat out of his hand and that is just what we would have to do if we sign this contract. Now in regard to the Board meeting, we decided to postpone it until your return home from

your vacation. I am enclosing, herewith, a copy of the contract which you can look over at your leisure. You do not need to return this copy as I have another here."

Justice STEPHENS. It is understood that this letter is received, of course, subject to the general objection and ruling with respect to this class of testimony which was outlined this morning.

## By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 118, Mr. Griswold, which purports to be a letter from you to Mr. J. B. Davis, under date of September 20, 1926, and ask you to examine it first, and then I will ask you some questions concerning it.

A. Yes, I would say this was the original letter, it is my

stamped signature.

Mr. Steffen. I now offer Government's Exhibit 118 in evidence.

Justice STEPHENS. It may be received, subject to the general restrictions of this morning's ruling with respect to this class of testimony.

(The letter referred to, marked Government's Exhibit

No. 118, was received in evidence.)

## By Mr. STEFFEN.

Q. On the second page, Mr. Griswold, you refer to "Harry" and "Ed." Will you tell us who Harry and Ed are?

A. "Harry" had reference to Mr. Harry Benn, who was a director of the American Gypsum Company; and "Ed" had reference to Edward McCrady, a son of J. H. McCrady, who was also a director in the American Gypsum Company.

Q. I now show you Government's Exhibit No. 119, which purports to be your letter, under date of October 7, 1926, to Mr. S. L. Avery, and ask if you can identify it as

813 being your letter.

A. Yes, I would say that that was the original

letter, with my stamped signature.

Q. I now show you Government's Exhibit No. 120 for identification, which purports to be a copy of a letter addressed to you under date of October 9, 1926, and ask if you can identify that as a copy of a letter which you may have received in reply to your letter to Mr. Avery.

A. Yes, to the best of my recollection, that is a copy of a letter that I received from Mr. McCrady, but I could, of course, not say it was word for word; but I would say it is

a copy. ;

Mr. Steffen. I now offer Government's Exhibits 119 and 120 in evidence.

I will read the letters. Exhibit 119 has been identified as being a letter from Mr. Griswold to Mr. S. L. Avery, dated October 7, 1926.

"Dear Mr. Avery:

"Simply because you do not hear from me, do not think there is not being some work done on the matter of the

licensing agreement.

"Two of our directors have been away and have just returned and we have a meeting scheduled for Monday of the coming week, at which time some definite action will be taken on the matter.

814 "On the matter about which you are familiar I simply report progress with the expectation that it will go thru as planned."

Mr. Avery's reply, being Exhibit 120, under date of

October 9, 1926, reads: "Dear Mr. Griswold:

"Thanks for yours of the seventh. To be frank with you, I have been a little disturbed about the slowness of our progress, although I have appreciated the burden of your efforts in other fields and assumed that this was the cause of the delay. I have been postponing a rather extensive trip in the expectation of a conclusion on the matter, and am pleased to know that the meeting scheduled for Monday may bring some development that will decide it.

"I am very glad to know of the progress you report in your last paragraph, and I very much hope you accomplish this for the satisfaction it will be to yourself and for the good I believe it will bring to the industry in general."

Justice STEPHENS. Is there any objection to that letter, purporting to be from Mr. Avery?

Mr. Bromley. No, no objection. We admit that it was written and that there was a reply. I think counsel should point out that when he emphasized in Mr. Avery's letter, "and am pleased to know that the meeting scheduled for

Monday may bring some development that will de-815 cide it," that the reference is obviously a reference to the meeting of the Board of Directors of the American Gypsum Company referred to in the first letter.

Justice STEPHENS. I so understood it and I think that is clear, is it not, Mr. Steffen?

Mr. STEFFEN. Yes.

Justice STEPHENS. Those exhibits may be received, the first subject to the ruling of this morning with respect to

declarations, and the other is received as such without that restriction.

(The two letters referred to, marked Government's Exhibits 119 and 120, respectively, were received in evidence.)
See modification of ruling—Tr. 1144.

Mr. STEFFEN. May I ask for a five-minute recess, Your Honor?

Justice Stephens. This Court will be in recess for five minutes.

(At this point a five-minutes recess was taken, following which the proceedings were resumed.)

Mr. Steffen. Your Honor, I should like to present Mr. Frank Shields, who will assist in the presentation of the case.

Justice STEPHENS. We welcome you, Mr. Shields. You are from the Department of Justice staff?

816 Mr. SHIELDS. I am, Your Honor.

### By Mr. STEFFEN.

Q. I now show you, Mr. Griswold, Government's Exhibit No. 121 for identification, which purports to be a letter from you to Mr. S. L. Avery, dated October 9, 1926, and ask you if you can identify it.

May I withdraw the question, Mr. Griswold, and ask you to also examine Government's Exhibit No. 122 for identification, which purports to be a reply to the letter written by you under date of October 9, 1926? Have you examined Exhibits 121 and 122?

A. Yes.

Q. Are you prepared to say whether Government's Ex-

hibit 121 is a letter which you wrote?

A. Well, it is not the original, from anything that I can see, but it is my stamp, a facsimile of my signature that is there, and I remember writing a letter, and I would say that this, so far as I can remember, is probably, or is, a copy of what I wrote, but it is not on our stationery. As I said, it evidently has been copied from something else.

Q. And the carbon copy of a purported reply—can you say whether or not you received a reply to the letter which

is Government's Exhibit No. 121?

A. I would say yes, that I received this reply.

Justice Stephens. Have you offered these letters?

Mr. STEFFEN. I have not. I will offer Government's Exhibit 122, which purports to be a reply to the letter of Mr. Griswold to Mr. Avery under date of

October 9. Mr. Griswold has identified the reply, but does not identify, at the moment, the copy which we have before us.

Justice Stephens. Exhibit 122 may be received in evidence.

(The letter referred to, marked Government's Exhibit No. 122; was received in evidence.)

By Mr. STEFFEN.

Q. Now, Mr. Griswold, let me ask you whether you recall having written a letter to Mr. Avery under date of October 9, in which you said that it might interest him to know that Mr. Fuller and Mr. Channing of the Atlantic Gypsum Company had been with you for the past two days.

A. Yes, I remember writing Mr. Avery to the effect

that those gentlemen had called.

Q. Do you remember whether you wrote to Mr. Avery saying that you had considered it a very wise move to get pretty well acquainted with these gentlemen? "They claim they are going into the manufacture of Gypsum Wall Board as well as the manufacture of a pulp board"?

A. I think I wrote him to that effect, because naturally that would be the way I felt about it anyway, be-

cause I liked to know my competitors.

Q. Did you say to Mr. Avery in your letter, that you had talked earnestly with them on the matter of the licensing agreement, and that you thought that they were favorably disposed toward the licensing agreement?

A. I couldn't say that I talked with them about—well, I presume I did, too, talk to them about the license agreement, because at that time they were considering going into the board business, they were building a wall plaster plant-

Justice Stephens (interposing). You are only asked whether or not you remember writing Mr. Avery that you had talked to them.

The WITNESS. Well, I remember writing Mr. Avery.

By Mr. STEFFEN.

Q. That you had talked to them?

A. Yes.

Q. Do you recall whether or not you wrote to Mr. Avery asking whether or not you should give them a copy of the licensing agreement?

A. I remember asking Mr. Avery if he would send me a

copy, so I could give it to them, if he had any objections.

Q. Did you write to Mr. Avery under this date, October 9, 1926, and state that both Mr. Channing and Mr. Fuller appeared to be very earnest in going into the business to

make money, and to maintain a fair price? That is

819 a loose statement.

A. I don't remember, without something to refresh my memory.

(Exhibit No. 121 was handed to the witness.)

Mr. Bromley. It is not only a loose statement, Counsel, but it is an inaccurate one.

Mr. Steffen. He shouldn't recall it, then. I will withdraw the question.

## By Mr. STEFFEN.

Q. Do you recall whether or not you wrote in your letter of October 9, 1926, to Mr. Avery, that Mr. Channing and Mr. Fuller assured you that "their experience in the business is such that they feel absolutely confident of their ability to get the same prices for their products as other companies get for their's, and intimated that they do not expect to follow any other policy than that of selling their materials at the market prices established by other concerns in the same line"?

A. I would say yes, that I wrote that to Mr. Avery.

Mr. STEFFEN. I offer Government's Exhibit No. 121.

Mr. BROMLEY. No objection except the general one.

Justice STEPHENS. It may be received, subject to the general objection to this class of evidence.

(The letter referred to, marked Government's Exhibit

No. 121, was received in evidence.)

820 By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 123, which purports to be a copy of your letter to Mr. Avery under date of October 15, 1926, and ask you to examine it and state whether or not it is your letter.

A. Yes, I would say that was an original letter.

Mr. Steffen. I offer Government's Exhibit No. 123 in evidence.

Mr. OLIVER. May I ask, is that D-25?

Mr. STEFFEN. That is D-25, yes.

Justice Stephens. That is the letter signed by Mr. Grisweld himself, to Mr. Avery, of October 15?

Mr. STEFFEN. That is correct.

Justice STEPHENS. It may be received, subject to the general ruling restricting this class of evidence.

(The letter referred to, marked Government Exhibit No.

123, was received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 124 for identification, which purports to be a reply to your letter of October 15, Government's Exhibit No. 123, and ask if you recall having received that letter.

Mr. Bromley. What is the date of it, please?

Mr. STEFFEN. October 19, 1926.

821 Justice STEPHENS. That is D-26, Mr. Knuff?

Mr. KNUFF. Yes.

The WITNESS. I do not remember of receiving this particular letter; there is nothing on it to indicate that I did.

By Mr. STEFFEN.

Q. It is just a copy of a letter?

A. Well, I can't say at this time as to receiving that letter.

Q. I show you your letter of the 15th, October 15, for examination. My question, Mr. Griswold, is whether you recall having received a reply at all to your letter of October 15, Government's Exhibit No. 123.

A. This copy would indicate that, but I cannot recall it particularly at this time. There is nothing in the letter to indicate or to bring it to my mind that I did receive it. I undoubtedly did, but I cannot remember it at the present time.

Mr. STEFFEN. Government's Exhibit No. 123 has been admitted, has it not?

Justice STEPHENS. Yes.

Mr. STEFFEN. I offer Government's Exhibit No. 124 on the ground that it internally is connected with Mr. Griswold's letter of October 15, it purports to be a reply to that. It speaks of some of the matters that are referred to in

Mr. Griswold's letter of October 15, and the copy was obtained from the files of the United States

Gypsum Company under subpoena.

Mr. BROMLEY. That copy?

TEFFEN. That copy.

e STEPHENS. Is there any objection?

BROMLEY. No objection, except the general one.

e STEPHENS. Received. letter referred to, marked Government's Exhibit, was received in evidence.)

By Mr. STEFFEN.

now show you Government's Exhibit No. 125, which s to be a letter from you to Mr. Avery, under date ber 9, 1926, in reply to Mr. Avery's letter of the id ask you to read the letter and state whether or your letter.

ee STEPHENS. Is that a mistake in the date, or is it ent month?

STEFFEN. We cannot testify, that is what the letter

OLIVER. Is that Exhibit D-23?

ce STEPHENS. D-23, apparently.

STEFFEN. That is right.

BROMLEY. I would be prepared to stipulate, Mr. if you agree that it is correct, that that letter should bear the date of October 20.

Mr. STEFFEN. Which letter do you refer to, Mr. Bromley?

BROMLEY. The one that is now before the witness, October 9th, Exhibit 125 for Identification.

STEFFEN. Well, if it is your information that that orrect date, we will so stipulate.

BROMLEY. A study of the letter will indicate that it ly was dated October 20th or 21st.

tce Stephens. The stipulation may be recorded.

WITNESS. I would say that that was the original

By Mr. STEFFEN.

hat this was your letter?

STEFFEN. I offer in evidence Government's Exhibit

Justice STEPHENS. It is again offered as a declaration of a co-conspirator, I take it?

Mr. STEFFEN. That is right.

Justice STEPHENS. It may be received, subject to the

general ruling made this morning.

(The letter referred to, from Mr. Griswold of The American Gypsum Company, to Mr. S. L. Avery, was marked Government's Exhibit 125 and received in evidence).

Mr. Steffen. I would now like to read Government's Exhibit 125, which has been identified as a letter from Mr. Griswold to Mr. Avery under the corrected

date of October 20, 1926:

"Dear Mr. Avery: Replying to your letter of the 19th, I regret to report that I was unsuccessful in getting all of the people interested to attend the meeting on the 21st. as planned, but some of them were unable to come on account of previous engagements.

I do not believe I will be able to get them together until after the first of the month, but all of them have expressed the desire to come as soon as they can arrange their affairs

to do so.

I might add that the Atlantic Gypsum Company is very much interested, judging from a recent telegram I received

from them.

I am quite sure you appreciate what I have to contend with and also appreciate the fact that if the original plan should fail of unanimous consent of all of the manufacturers, and if the other deal about which you are familiar should materialize, it will still leave the way open to bring the matter to a head in a much easier way. I am quite sure that one or the other will succeed by patient and persistent work."

## By Mr. STEFFEN.

Q. Mr. Griswold, will you state to the Court what you meant in the last paragraph by your reference to the "original plan" which was to receive unani-

mous consent of all of the manufacturers?

A. That had reference to the proposition of license agreements, as I remember it. This litigation, or threatened litigation, was going on, and a number of these companies either had been notified of an infringement or had suits against them, including ourselves, and we had discussed the matter at previous meetings, and that is what I am referring to here, and——

Q. (Interposing). Now will you tell the Court-

Mr. Bromley (interposing). Let him finish what he was saying.

By Mr. STEFFEN.

Q. Had you finished, Mr. Griswold?

A. That is the only thing that I refer to except this

Q. (Interposing). Now may I ask you concerning this, Mr. Griswold; you also refer to another plan, in that same paragraph. What did you have in mind there?

A. That was quite an extensive one.

Q. You say, "\* \* it would still leave the way open to bring the matter to a head in a much easier way." Would you explain what you meant by that statement?

> A. I had had under consideration for some time the merging of several of the smaller plants into

one company, and among those contemplated in the merger were a number of these concerns that had been in these meetings-one was the Niagara Gypsum Company, another the Empire Gypsum Company, and as I remember it, at that time the Ebsary Gypsum Company was there, and at one time we had the Atlantic Gypsum Company-

Q. (Interposing). What about Texas, the Texas Gypsum Company?-A. And also the Texas Gypsum Company. This was a plan of my own for merging those smaller companies into one larger company which was to be under the name of The American Gypsum Company, and they were to be simply branches of The American Gypsum Company, subsidiaries, or whatever you want to call them. These people were all either at that time in the wallboard business, or were intending to go into it, and they would all be affected by this ultimate decision of the United States Gypsum Company if they were successful in establishing their patent claims.

And naturally, of course, I wanted to keep my own people out of trouble. I had had enough already, and Reeb already had a claim against him. So we were anxious to get those matters cleared up, and in connection with that, the longer the thing ran without clearing up, the more liability there was that accumulated against these

companies.

And one of the most embarrassing things about it was the fact that in financing this merger we had not, as I remember it, at this time, arrived at any amount of damages, or the U.S.G. had not set any amount of damages

claimed against these companies, and consequently we couldn't set up any amount of liabilities, they were unknown, we couldn't establish what they were, and we had difficulty in financing the thing without we had that knowledge.

So I was anxious to get these matters settled so that I

could go ahead with this merger proposition.

Q. What effect, if the merger went through, would that have upon the licensing agreement arrangements with

United States Gypsum?

A. Well, if the license agreement went through, these companies—or if the merger went through, this licensing agreement that applied to these companies, they didn't need to take out a license agreement. Under the plan that we had at that time they were to become simply operating branches, like the Niagara Branch, and the Empire Branch, of The American Gypsum Company, and the license we were going to take out under the American Gypsum Company covered all the rest of the operating companies.

Q. Mr. Griswold, did you ever discuss with Mr. Avery this matter of the merger and the probability that if the

merger went through it would take out a license?

A. Yes, I would say I did.

Q. Can you tell us when you first had a conversation with Mr. Avery?

A. No, I cannot.

Q. Can you name any time, any specific time, when you had such a conversation?

A. No definite date without something to refresh my

memory with.

Q. Did you have one or more than one conversation with Mr. Avery upon that matter?

A. Well, I think I had more than one, but I can't say.
Q. Your letter is written under date of October 9, 1926—had you had a conversation with Mr. Avery prior to that?

Mr. BROMLEY. What exhibit is that, please?

Mr. STEFFEN. Exhibit 125.

The WITNESS. Now what is your question?

By Mr. STEFFEN.

Q. Can you tell whether or not you had a conversation with Mr. Avery prior to the date of that letter, concerning the fact that the merged companies, if it went through, if the merger went through, would take out a license agreement with the U.S.G.?

A. The fact that I was working on this merger was no secret, everybody in the business seemed to know 829 about it, and I bad a talk with Mr. Avery because naturally he was in the gypsum business and I had no objection to him knowing about it, and also Mr. Avery knew that I very much favored the license agreement because I had approached him on the thing and favored it in that way. That was the only method that I could see of settling this dispute. The business was pretty well shot, the whole industry, with lawsuits and so forth, and I was trying to arrive at some way of settling the thing so as to do away with this litigation and trouble.

Q. Did you have any other reasons for favoring the licensing agreement besides the settlement of the litigation,

infringement litigation?

A. Yes, I always wanted to make a closed-edge type of board.

Q. And the license agreement would allow you to do

that?

A. The license agreement would allow me to make that board for the reason that the license agreement, if the prices of the license were not too high, I figured it wouldn't cost me anything because I could save it in the cost of manufacturing the board.

Mr. BROMLEY. When you say "price" you mean royalties, don't you?

The WITNESS. The royalties I have reference to, when I am talking about prices.

## By Mr. STEFFEN.

830 Did you consider the matter of prices of the board with regard to the licensing agreements, the effects of the licensing agreements upon the prices of the board?

A. You mean the sale price?

Q. I will withdraw that question. In considering the licensing agreements did you consider their effect upon the price of the commodity, as well as the royalty question,

whether they would have a stabilizing effect?

A. Well, I think I did, because I knew very well, and had consulted with my attorneys on the legal side of this question, and they had advised me that I had a perfect right to enter into a license agreement under the patent laws, and if Mr. Avery saw his way clear to grant a license, he had a perfect right to grant it; and in granting him the patent the law also gave him the right to tell us licensees, or whoever took out the license, the price at which

they should sell the product. There was no secret about that; everybody seemed to know it at that time; and naturally I figured that inasmuch as the price had already been stable for the past number of years, and they had been the people that had established it, and if they had the authority under the patent I supposed naturally they would maintain a fairly steady price.

Q. And that was agreeable to you?

A. I was perfectly willing to trust it to them, just on their past experience in the business. 831

Q. You say that they had maintained a fairly

stable price; what do you mean by that?

A. Well, the price on wallboard had been \$30 a thousand square feet, that was the sale price to the dealer, from the United States Gypsum Company.

Justice Jackson. Was that on the raw-edge board?

The WITNESS. On the closed edge type. The raw-edge board always sold at quite a considerably less figure, and that price—well, it is pretty hard to remember, but I don't think there had been any disturbance in the price at this particular time; that price hadn't been disturbed since the manufacture of wallboard began, and-

By Mr. STEFFEN (interposing).

Q. Did it subsequently become disturbed?

Mr. BROMLEY. Don't interrupt him.

The WITNESS. Naturally, having remained steady for years past, I figured that if we acknowledged the patent of the U.S.G.—and at this time we had practically given up hopes of winning the suit against them and we were facing the proposition of either going out of business or else taking out a license agreement, so I was perfectly willing to leave the price situation to the United States Gypsum Company.

By Mr. STEFFEN.

Q. Were the other members of your Board of Directors similarly ready to leave the price situation to the United States Gypsum Company?

A. Well, as I remember it there was some oppo-

sition among some of our directors.

Q. Can you name who opposed it? A. Well, as I remember it now, Mr. Miller at that time was a director on the Board, and he represented the interests of John A. Kling of Cleveland, who held a very

substantial interest in the stock of the company, and they

had some objection to that; but without something to refresh my memory, I have had other troubles since and I can't remember.

Q. Did the price on gypsum board remain steady after this time, which was in October, 1926, if you recall—during

the years 1927 and 1928, I will say?

A. I think it possibly remained undisturbed during 1926, but in 1927, as I remember it, the prices began to be disturbed.

Q. And what do you mean by "disturbed"?

A. Well, there were lower prices being quoted by certain interests, especially on certain types of board.

Q. And which interests do you have in mind?

A. Some of the independent manufacturers.

Q. Could you name one?

A. Well, the Certain-teed Products was one.

Q. Were their prices lower or higher?

A. They made nothing at that time, as I remember it, but an open-edge board, and they offered it at quite a low price.

Q. Did the other manufacturers attempt to meet that

price?

A. Not with the closed-edge type board.

Q. How did they try, if they did?

A. They tried to meet it either by manufacturing an open-edge type board, or by selling what was known as culls or No. 2's, of covered edge board. There were some boards that were imperfect, that were thrown out, and had some blemishes on them, which were offered to the trade for the while as No. 2 board. They tried to meet this competition by that type of board.

Q. What was a No. 2 board in the industry?

A. Well, a No. 2 board was a board that was thrown out by the inspectors. These boards were all looked over when they came out of the dryer, and if they had some blemishes, an imperfect edge, or a spot where the paper did not adhere to the gypsum, it was put on a separate car and was thrown out as a No. 2 or a second. Those were afterwards re-sorted and some of the better ones were sold as No. 2 board, and some of the others were cut up into smaller sizes and sold as lath where people did not expect anything at that time except a raw edge on four sides, and inasmuch as they plastered over it, if there was some little spot where the paper didn't adhere, it didn't make

any difference anyway; so that they were cut

834 up into boards of that kind.

Q. Now as I understand your testimony, you say that in 1927 and 1928 the prices of wallboard became disturbed—is that correct?

A. Yes, as I remember it they were lower. That is, I think the price of No. 1 covered-edge board was disturbed to a certain extent in those years, as I remember it.

Q. And the price of the open-edge board was less than the

price of the No. 1 board?

A. It was.

Q. And was sold in competition with the No. 1 board, is

that right?

A. Well, they were not very successful; they sold it if they could, but it was not very successful competition to a closed edge type of board, which was always recognized as the better.

Q. Was there any quantity of open-edge board sold?

A. Yes, there was quite a lot.

Q. And it was sold at a lower price?

A. At a lower price, yes.

Q. Then explain, if you can, what was the difference between seconds and the No. 2 board, so-called?

A. Well, the terms meant the same thing. No. 2 board

or seconds were the same thing.

Q. Did each of the companies in 1926 manufacture

835 a No. 2 board?

A. Well, I don't think-well, let me see, I don't think in 1926 they did.

Q. When did they commence manufacturing a No. 2

board?

. A. Well, when the prices got so-

Justice STEPHENS (interposing). The Court is a little puzzled. As I understand the witness a No. 2 board wasn't manufactured as such, but it just happened; in other words it was the inferior product or culls which were normally produced in the general run of the making of the board. Am I mistaken about that, or did they manufacture, as such, a No. 2 board?

The WITNESS. No; in the early part of this period, in 1926, there was nobody that manufactured a No. 2 board. They were obtained, as I said, by the inspectors throwing them out as they came off the line. Later on, however, when the prices got so disturbed and the prices on this open-edge type board was so low, then, as I remember it, one or two of the manufacturers probably put out what they called a No. 2 board.

Justice Jackson. With the main purpose of competing with the open-edge board?

The WITNESS. That is right.

Justice STEPHENS. How did it differ from the No. 1 board; how did the No. 2 board, which was thus manufactured as No. 2 board, differ from the other board?

836 The WITNESS. Well, to tell the truth I couldn't tell the difference very much in some of them. They were made thinner as a rule; it was a little thinner board that was offered. The standard wallboard and plasterboard was \% of an inch thick; but they afterwards, when there was this competition, made some that was—I have seen some only 3/16 inch and quite a lot of it a quarter of an inch and 5/16 of an inch.

## By Mr. STEFFEN.

Q. Was this competition between the No. 2 Board, and the open-edge board, and the No. 1 Board, and the variance in prices, was that one reason why you favored the license

agreements, to eliminate competition?

A. Well, I figured that if these people elected to take out a license, naturally they would want to manufacture the best board they could, which it was pretty universally recognized was this closed edge type board; and if they did that, naturally that would have a tendency to eliminate these other boards from the market because they were only put out to compete with and raise a disturbance, as a rule.

Q. And that would eliminate competition in price, would

it?

Mr. BROMLEY. I object to that as calling for a conclusion.

Justice STEPHENS. I think the questions are leading and conclusional. Sustained.

837

## By Mr. STEFFEN.

Q. State whether or not it was your opinion that if the United States Gypsum Company were to fix prices under the license agreement, as they proposed, that would tend to make a uniform price and eliminate competition?

Mr. Bromley. That is leading, and I object to it for that reason; and it calls for a conclusion.

Justice STEPHENS. It is a very critical question in the case, of course, Mr. Steffen, and I think counsel ought not to lead, under those circumstances. Sustained.

Ask your witness to state what it was that was agreed upon.

By Mr. STEFFEN.

Q. Well, I refer you to the matter of the competition that you have just testified to, and the price differences be-

tween the open-edge board and the closed-edge board, and ask if that was a circumstance which you considered in favoring the license agreements under which the United States Gypsum Company would fix the price? Answer that yes or no.

A. I am not clear on that question. Repeat it again.

Q. I will rephrase the question.

I refer you again to what you have just testified to concerning the competition in the industry, and the difference in prices between the open-edge board and the closed-edge

board, and ask if one of your purposes in favoring the license agreements was to bring about a situation where the United States Gypsum Company could fix a uniform price?

Mr. BROMLEY. I object to that as leading.

Justice STEPHENS. It seems to me on a matter which is as critical under the issues in the pleadings as this, that

leading questions shouldn't be asked.

This is an intelligent witness, he has a good memory, and understands what he is talking about. I don't see why you can't, Mr. Steffen, ask him to state what were the purposes, and all of them, which he had in entering into these license agreements. Let him enumerate from his own recollection, rather than you suggesting what they were.

By Mr. STEFFEN.

Q. Well, we will go back over the matter, Mr. Griswold, and I ask you to state what were the reasons, naming them all, that induced you to favor going into the licensing agreement with USG?

A. Primarily my reason was to get the right to make a closed-edge type board, which I wanted to make from the start but was prohibited from doing by this so-called Utz-

man patent.

Q. That was your first reason?

A. That was the first one. And a further reason, that from what I knew of the manufacturing end of the business, that was not only the better but the cheaper board of any

of them to make, from the cost of manufacture, because there was no waste about it, and very few seconds or culls.

Q. Well, were there any other reasons why you thought it would be better to have a licensing agreement than not to have one?

Justice STEPHENS. Take your time and state them all, that you actually had and can recollect, Mr. Griswold, and state them in your own way.

The Witness. One reason I had in mind was that this litigation that was either threatened or was actually going on at the time, was affecting a number of people whose plants I had built, and who were very good friends of mine; and having gotten tangled up in this license agreement the way we had—and perfectly honestly, so far as we were concerned, because we though we had an exclusive right to manufacture under our Clark patent—but having had the Patent Office decide, I don't know whether it was at this time or not, against us, and placing us in a position where we were liable for past infringements, and practically in a helpless position, we either had to take out a license or go out of business, or make an open-edge board.

I didn't want to see these people get mixed up in that, because they were friends of mine, and I figured that the sensible think to do, for them, was to avoid it, because sooner or later if they attempted to make any type of board

outside of an open-edge, which I assured them they would soon find out they couldn't sell at a price where they could make anything on it, the price was so low that they would have to come to it anyway and make a closed-edge type of board, and the only way they could do that was to do as we were considering, taking out a license agreement with the United States Gypsum Com-

pany and save all this expense of litigation, which was

running into a good many thousands of dollars per year.

Whether or not it would affect the price was a matter that I was perfectly willing to leave up to the United States Gypsum Company, they were the owners of the patent and they had the legal right to say what price that board should be sold at, and we had nothing to say about it. We would be compelled to sell at the price they said, or otherwise violate their license agreement, which gave them the right to cancel their license. So I was perfectly willing to leave that to them.

Mr. STEFFEN. Thank you.

Justice STEPHENS. We will adjourn at this time.

(Whereupon, at 4:00 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Friday, November 19, 1943.)

841 In the District Court of the United States For the District of Columbia

Civil Action No. 8017

United States of America, Plaintiff

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS

SEVENTH FLOOR, INTERNAL REVENUE BUILDING, Washington, D. C., Friday, November 19, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia, pursuant to adjournment.

Appearances: (Same as heretofore noted), and the adtional appearance of Frank Shields, Esq., on behalf of the

Department of Justice.

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#### PROCEEDINGS

Justice STEPHENS. The Court will be in session. Mr. Adams, have you any authorities?

Mr. Adams. I will say, Your Honor, that I had some commitments last night that prevented me from looking into this matter other than very briefly. As far as I could find out from the very cursory examination, the position that I took that the letter does not prove itself, that there must be more than that, seems to be sound.

I have not, at this point, any cases which I can supply to the Court which are directly in point. I did look at Wigmore, and one or two other texts, and they seem to support my position, but I would not like to go farther at this point.

Justice STEPHENS. That was Exhibit 119, wasn't it?

Mr. ADAMS. As I recall it, it was.

Justice STEPHENS. That is the McCrady letter?

Justice GARRETT. It is Government Exhibit 117, on page 1103.

Mr. ADAMS. That is right, Your Honor.

I have another correction that I would like to make, if I may.

Justice STEPHENS. We will come to the corrections in a moment.

I think, Mr. Adams, that you are mistaken about the authorities on the subject. We interested ourselves in it last night, my law clerk and myself, and I call your attention to the General Index Statement in Corpus Juris Secundum, at page 705, under the title Evidence. "Proof of the genuineness of the signature is sufficient authentication to warrant the admission of the letter. The genuineness of a letter or of the signature thereto may be sufficiently established by proof of the handwriting, but other evidence may be resorted to for this purpose."

" evidence which, if uncontradicted, would satisfy a reasonable mind of that fact, is sufficient to authorize the admission of the communication."

Examination of the cases which have been cited by the courts on the subject discloses very few in which letters have been introduced merely on the identification of a signature, but there are two such cases—Davis v. Fall, 288 SW 723 (Sup. Ct. Ark. 1926); and Burgess v. Burgess, 44

Neb. 16, 62 NW 242 (1895).

Then other cases, which indicate that identification of a signature plus circumstances of identification are sufficient, exist, such circumstances as the contents of the letter being of a character which would naturally be written by the alleged writer, and the use of a letterhead which is likely to be used by the writer. Flickema v. Henry Kraker Co., 252 Mich. 406, 233 NW 362 (1930); Galveston Railway v. Booth, 209 SW 198 (Texas Civil Appeals, 1919); International Harvester Co. v. Campbell, 43 Texas

844 Civil Appeals 421; 96 SW 93 (1906); and Lundgren v. Union Indemnity Co., 213 NW 533 (Minn. 1927). That case indicates that the matter is generally within the discretion of the trial court in any event.

Now you have some corrections to the record to suggest,

do you, Mr. Adams?

Mr. Adams. Do you want me to mention the correction I have now, Your Honor?

Justice STEPHENS. Yes. What page?

Mr. Adams. Page 1113. At that point Your Honor allowed in evidence Exhibits 119 and 120, after Mr. Bromley's objection; the first one was admitted subject to the ruling

with respect to declarations, and the other was received "as

such without that restriction"...

I take it that that was entirely proper in so far as Mr. Bromley's client was concerned. I, myself, did not hear the ruling, because it was my intention at that time to object with respect to both of the exhibits generally, so that we would have the protection of Your Honors' ruling during the morning.

Justice STEPHENS. Well; the ruling so far as declarations are concerned has been made in a manner which protects all defendants. All declarations of alleged co-conspirators are received in evidence at the present time subject to the ultimate establishment of a prima facie case of conspiracy.

Mr. Adams. I was a little concerned about the language that Your Honor used—"and the other is received as such without that restriction", and I wasn't sure that that did protect us.

Justice STEPHENS. The other one, I think, was a letter.
What is Exhibit 120? A letter from Mr. Avery, I
think, and consequently, so far as USG is con-

Mr. Adams (interposing). Yes, 120 is a letter from Mr. Avery.

Justice STEPHENS. So far as the defendant United States Gypsum Company is concerned, it was not necessary to be received subject to the restrictions. So far as the other defendants are concerned, it may be received subject to the restrictions.

Mr. ADAMS. That is what I wanted to clear up.

Justice STEPHENS. The record may show, in reference to the ruling on page 1113 with respect to Government's Exhibits 119 and 120, that the ruling is modified as follows:

Exhibits 119 and 120, that the ruling is modified as follows:

The reception of Exhibit No. 120 is without restriction as to the United States Gypsum Company; with respect to the other defendants; it is received subject to the usual restriction which the Court previously announced concerning declarations of alleged co-conspirators.

Whereupon FRANK J. GRISWOLD the witness on the stand at the time of adjournment, resumed his

testimony as follows:

Direct examination (resumed) by Mr. STEFFEN.

Q. Mr. Griswold, I would like to refer you to the matter that we were talking about at the end of the

session yesterday, that was Government's Exhibit No. 125, which was a letter from you to Mr. Avery under date of about October 19th or 20th, and I show it to you simply to refresh you as to the paper we were talking about at that time, and I have no more questions to ask you concerning it.

Justice STEPHENS. What is that in here?

Mr. KNUFF. D-23, Your Honor.

Mr. STEFFEN. It was admitted in evidence on page 1121 of the record.

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 126, which purports to be a reply to your letter, under date of October 23, 1926, and ask you to examine it and state whether or not you received such a reply?

Justice STEPHENS. Before you answer that question, have counsel now sufficiently examined this file so that each of the Judges could have one of them without undue inconvenience to defendants' counsel?

Mr. FINCK. Here is one. (Handing file to the Court.)

Justice Stephens. Will that deprive you of one during the examination?

Mr. FINCK. We can get along without it. Mr. 857 Adams has one.

Mr. ADAMS. I can borrow a set from Mr. Oliver, so we are all right.

Mr. OLIVER. Will you indicate the D number on that, Mr. Steffen?

Mr. STEFFEN. That was D-24.

The WITNESS. I have no recollection of receiving it. There is nothing on the letter to indicate that I had seen the letter.

By Mr. STEFFEN.

Q. Do you recall whether you received a reply to your letter of the 20th?

A. I do not—at this time.

Q. And is there anything in that piece of paper which refreshes your recollection as to whether you did or didn't receive a reply?

A. Well, there is one part here where the writer says that "Charley tells me that he phoned you this morning,"

that he had phoned me. That is the only thing that I remember, "Charley".

Q. Who is Charley?

A. Mr. Henning, he went by that name, Charley.

Q. And who was Mr. Henning?

A. He was the Sales Manager of the United States Gypsum Company.

Q. Did you know him? 858

A. Yes, I was slightly acquainted with him. Q. How long had you known Mr. Henning?

A. Probably around 1910 to the time of his death.

Q. When did he die?

A. I think it was in 1936 or somewhere around there. He was killed accidently.

Q. You knew him for about 26 years? A. Off and on I was in contact with him.

Q. And do you recall whether Mr. Henning telephoned

to you, as the letter recites?

A. Yes, I do remember that he telephoned something about Mr. Avery I think it was, wasn't able to-or was out of town, or something of that kind, it is an indistinct recollection, but I remember him telephoning.

Mr. Steffen. We offer Government's Exhibit No. 126 in evidence.

Mr. OLIVER, I object.

Mr. Bromley. No objection except a general one.

Justice STEPHENS. What is your objection, Mr. Oliver?

Mr. OLIVER. I object to it because the witness hasn't identified it at all, he said he had no recollection of ever receiving it.

Justice STEPHENS. We think the exhibit is not admissible, over objection, Mr. Steffen, except in the following informal way. It has apparently refreshed the witness' recollection as to a conversation with Charley Henning. Counsel may always exhibit to the Court a paper or object which has refreshed recollection so that the Court may be advised whether or not it is likely to have done so, but it doesn't become a part of the record as evidence. The witness has answered that he can't recollect receiving the letter, and can't identify it at all. It is not admissible as such.

Mr. Steffen. I would like the record to show that it was apparently dated October 22, instead of October 23, the



date is not too clear, as it appears on the typewritten copy that we have.

By Mr. STEFFEN.

Q. I now show you, Mr. Griswold, Government's Exhibit . No. 127, which is D\28, which purports to be a letter from you to Mr. Avery under date of November 1, 1926, and ask if you can identify that as your letter to Mr. Avery?

A. Yes, this is the original letter that I wrote to Mr.

Avery.

Mr. STEFFEN. I now offer Government's Exhibit No. 127 in évidence.

Justice STEPHENS. It is received subject to the general restriction with respect to declarations announced yesterday.

860 (The letter from Mr. Griswold to Mr. Avery dated Nov. 1, 1926, was marked as Government's Exhibit

127 and received in evidence.)

By Mr. STEFFEN.

Q. Now, Mr. Griswold, could you tell the Court what letter you were replying to, in your letter of November 1, 1926, if you can?

A. I was replying to a letter written on October 22, di-

rected to Mr. Avery.

Q. You say "directed to Mr. Avery" or written by Mr.

Avery?

A. No, this letter here is the one you wanted me to identify.

Q. That is correct. A. That is my original letter.

Q. Now the question is—what letter were you replying to in your letter to Mr. Avery?

A. The letter of October 22, the letter says. I have no

recollection of it outside of this.

Mr. Steffen. I new again offer Exhibit No. 126, which I think has been connected by internal reference with the letter which the witness has just identified, and which has been admitted. The matter is not of any great moment.

Mr. OLIVER. I renew my objection for the same reason, it has not been identified.

Justice Stephens. I am afraid that is correct, Mr. 861 Steffen, the letter has nothing on its face to identify it, and the witness says he has no recollection of it. All he is saying is that his letter was in answer to a letter of the

22nd, and not to that letter. If that letter had something on its face indicating that it was from Avery, I think you might be correct that it was then circumstantially identified, but I am afraid that the objection is correct. Sustained.

Mr. Steffen. There is a great deal of internal evidence, Your Honor, that would seem to connect the reply, the fact that the witness has identified the telephone call with Charley; the fact that in his letter of November 1 he refers to a letter of October 22 to which he is replying; and the fact that he says in his reply, on November 1, that "It will be impossible for me to be in Chicago this week, but will call and see you when I am there", while in the letter of October 22 there was an attempt to arrange a meeting for the first week in November.

I think that is sufficient to tie the two together, although the witness states that he is unable to identify this par-

ticular copy.

I might add the point that this copy was taken from the files of the United States Gypsum Company, under subpoena.

.Justice STEPHENS. Is that conceded?

862 Mr. BROMLEY. Yes, Your Honor.

Justice STEPHENS. That being the case, it seems to me that it ought to come in, Mr. Oliver.

Mr. OLIVER. If Your Honor please, it is not possible to tell from the date of this letter whether it is the 22nd or the 23rd. My copy certainly looks like the 23rd. Now armed with the two other letters that have been refrered to, it wouldn't be difficult for me, an outsider, to type this sheet of paper, Exhibit 126.

Justice STEPHENS. I think in view of the fact that it was found in the files of the United States Gypsum Company, that that circumstantial proof is so strong that we ought not to reject it, and the objection is now overruled. The letter is received, so far as defendants other than the United States Gypsum Company are concerned, subject to the usual restriction with respect to declarations.

(The letter to Mr. Griswold purporting to be from Mr. Avery, dated Oct. 22, 1926, was marked as Government's

Exhibit No. 126 and received in evidence.)

By Mr. STEFFEN.

Q. I now show you, Mr. Griswold, Government's Exhibit

No. 128, which purports to be a letter from you to Mr. S. L. Avery under date of November 16, 1926, D-29.

A. Yes, that is an original letter by me to Mr. Avery.

Mr. STEFFEN. I now offer Government's Exhibit No. 128 in evidence.

Justice STEPHENS. Let us read it.
Is there any objection except the usual objection?

Mr. BROMLEY. That is all, sir.

Justice STEPHENS. Received in evidence, subject to the

ruling with respect to declarations already made.

(The letter from Mr. Griswold to Mr. Avery dated November 16, 1926, was marked as Government's Exhibit 128 and received in evidence.)

Mr. Steffen. Your Honor, without reading this to the Court may I ask that these three short paragraphs appear in the transcript?

Justice STEPHENS. You mean the whole letter?

Mr. STEFFEN. Yes.

Mr. Bromley. I object to that as being improper practice, to place the emphasis which results from singling out any particular exhibit and reproducing it in the record.

Justice STEPHENS. All three of the Judges have read it, it doesn't seem to us necessary to put it into the record.

Mr. STEFFEN. Thank you.

Justice STEPHENS. By the use of the word "record, of course, Mr. Reporter, I mean the word "transcript". It is, of course, part of the record of the case as a whole.

By Mr. STEFFEN.

Q. I now show you Government's Exhibit 129, which purports to be a copy of a letter addressed to you under date of November 22, 1926, in reply to your letter of the 16th to Mr. Avery. This is Government's Exhibit D-30.

Mr. ADAMS. Mr. Steffen, it would be very helpful, if you can, to refer to the D numbers when you are identifying them.

Mr. Steffen. I did, sir.

Justice STEPHENS. D-30, Mr. Adams.

Mr. ADAMS. Thank you.

By Mr. STEFFEN.

Q. The question is, Mr. Griswold, whether you can recognize that as a reply, by the contents or otherwise, to your letter of November 16, Government's Exhibit No. 128?

A. I remember some of the contents of the letter.

Q. Do you recall receiving a letter from Mr. Avery on

the point?

A. I can not recall receiving this particular letter, and there are no marks on it indicating that I did so, or that it is an exact copy that I received.

Q. What are the matters that you remember in the con-

tent of the letter?

A. Well, one is that Mr. Avery at one time expressed himself as being disappointed that the American Gypsum Company had not given him a definite
decision. Up to this time my own company, the American
Gypsum Company, had not even signified their willingness,
they were opposing this license agreement. I remember that
part of it. But the letter itself I have no distinct recollection of having received.

Q. A now show you Government's Exhibit No. 130 for Identification, which purports to be a letter from you to Mr. Avery under date of November 29, 1926, in reply to Mr.

Avery's letter of the 22nd.

Justice Jackson. That is D-31?

Mr. STEFFEN. D-31.

The WITNESS. Yes, this is an original letter written by me to Mr. Avery.

By Mr. STEFFEN.

Q. And can you tell whether it is a reply to the copy of the letter which I showed you just a moment ago, Government's Exhibit No. 129?

A. I would say it was a reply to this letter of the 22nd.

Mr. Steffen. I now offer in evidence Government's Exhibits Nos. 129 and 130.

Justice Stephens. 129 is the November 22 letter?

Mr. STEFFEN. Yes; and 130, dated November 29, 1926, is a reply to that letter.

Justice STEPHENS. Was the letter of November 22 found in the files of the United States Gypsum Company?

Mr. STEFFEN. Yes, Your Honor.

Justice STEPHENS. Is that admitted?

Mr. BROMLEY. Yes, Your Honor.

Justice STEPHENS. Then both exhibits are admitted in evidence.

(The letters marked as Government's Exhibits 129 and 130, respectively, were received in evidence.)

# By Mr. STEEFEN.

Q. I now show you Government's Exhibit No. 131, which purports to be a reply to your letter of November 29, 1926, addressed to Mr. Avery. Exhibit No. 131 is dated December 30, 1926; and I ask if you can, upon examination of that paper, Government's Exhibit No. 131, identify it as a copy of a letter which you may have received from Mr. Avery in answer to your letter of November 29?

A. I can not remember receiving this particular letter, but the contents of the letter are information that I received in some letter, I don't remember whether it was this

one or not.

Q. When you say you can't remember having received this letter, do you mean you can't remember having

867 received this piece of paper?

A. There is nothing on this to indicate that I did receive it. Usually I put some mark on them to indicate that I had received the letter myself, but I say I am familiar with and I had received information along the lines of this letter, but whether it was in this letter or not I couldn't say.

Q. You can not identify that piece of paper as a piece

of paper which you ever saw before?

A. I can not say that I had seen it prior to this trial.

Justice STEPHENS. If these letters are received from the files of the United States Gypsum Company, which they apparently all are, they would not have reached this witness attention.

Mr. STEFFEN. Clearly so.

Justice STEPHENS. As far as the particular papers are concerned. The contents might have in the original.

Mr. STEFFEN. That is right.

By Mr. STEFFEN.

Q. And you remember, I think you have just testified, having received a communication from Mr. Avery along the lines of that communication?

A. I have the distinct recollection of receiving in some manner the information that is contained in this letter, but just how it came I couldn't say.

Q. You don't remember whether you received a

letter or not?

A. No, not at this time.

Q. I now show you Government's Exhibit 132, which is D-34, which purports to be a letter from Mr. Griswold to Mr. Avery under date of January 3, 1927, and acknowledges receipt of Mr. Avery's letter of the 30th.

I ask you to read it carefully and state whether or not

it is your letter?

A. Yes, this is a letter I wrote Mr. Avery.

Mr. Steffen. I now offer Government's Exhibit No. 132 in evidence.

Justice STEPHENS. Received in evidence, subject to the announced restriction with respect to declarations.

(The letter marked as Government's Exhibit No. 132 was

received in evidence.)

Mr. OLIVER. Your Honor, that same exception also went to the two previous exhibits? You didn't mention it.

Justice STEPHENS. Yes, I think the record clearly shows now that all of the letters which are in the nature of declarations of co-conspirators are admitted subject to the restriction that I have announced, that they must be connected by prima facie constitution of a case of conspiracy.

Mr. Steffen. I now offer Government's Exhibit
No. 131, which is the copy of the letter of December
30, to which Mr. Griswold testified he replied on January
3, 1927.

Justice Jackson. That came from the files of the USG?

Mr. BROMLEY. Yes.

Justice STEPHENS. It may be admitted.

(The letter marked as Government's Exhibit 131 was received in evidence.)

Mr. STEFFEN. Your Honor, I now would like to make a point of my right to read this letter of January 3 into the transcript. I would like to ask the Court to have this letter of January 3, 1927, appear in the transcript, and I may say that it is only one page and the expense is not going to be very great.

As respects the emphasis, it is a letter which should be emphasized, in our opinion. It is the culminating letter of about two years or a year and a half of negotiations between Mr. Avery and Mr. Griswold, and it is extremely important that the Court's attention be given to it.

I should therefore ask that I either be permitted to read it now and have it introduced in the transcript, or that

the Reporter set it out in full in the transcript.

Mr. Bromley. Well, I have no objection to his reading it, of course, but I do object to its going in the transcript. It seems to me that if he wants it in the transcript, then I am entitled to have all the letters in the transcript, a burden which I do not like to undertake, much as the Reporter might appreciate it.

Justice STEPHENS. We are agreed, Mr. Steffen, that it ought not to go into the transcript. You are at perfect liberty to read it to the Judges. We are glad to have the main points which counsel on both sides wish to bring especially to our attention and emphasize either now or in the argument, but it isn't the general practice, of course, . to copy into the transcript of the record any exhibits, if for no other reason because of the expense; and it doesn't seem to us that it is quite fair to emphasize one particular letter upon the theory that if you put it into the transcript the Judges will give more attention to it than they will to exhibits not in the transcript. I hope we will not fall into that error. I hope we will read all the exhibits with extreme pains. But it seems to me that the announced purpose of it condemns it, I say that in good part, and we are all agreed that these letters may not go into the transcript. You may read them to us freely if you wish to. We have already read it ourselves, but we will be glad to have you do it, if you desire.

Mr. STEFFEN. I will read the letter, even though it takes a little additional time, Your Honor.

Justice STEPHENS. Very well, proceed to do so.

(At this point Mr. Steffen read Government's Exhibit No. 132 to the Court.)

By Mr. STEFFEN.

Q. I now show you, Mr. Griswold, Government's Exhibit No. 133 for Identification, D-35, which purports to be a letter from you to Mr. Avery under date of January 31, 1927, and ask if you can identify it as your letter?

A. Yes.

Mr. Steffen. I now offer Government's Exhibit No. 133 in evidence.

Justice STEPHENS. It may be received subject to the usual restrictive ruling on declarations of co-conspirators.

(The letter marked as Government's Exhibit No. 133 was received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 134, D-36, which purports to be a copy of a letter to you under date of February 2, 1927, in reply to your letter of the 31st, which you have just identified—

Justice STEPHENS (interposing). Before you answer that, let me make this inquiry, Mr. Steffen, in the interests of time. The Government seems to have possession of the

file of letters written by Mr. Griswold to Mr. Avery, 872 taken, I assume, from the files of the American Gypsum Company or its successor in interest. Why haven't you, or can't you get possession of the original letters written by Mr. Avery to Mr. Griswold, such as this letter of February 2, and save all this difficulty of circumstan-

tial identification of these unsigned copies?

Mr. STEFFEN. I would say that we have filed very, very comprehensive subpoenaes, which were served upon the Celotex Corporation, which took over the American, and in all of their records the originals were not found. These, therefore, were found in the files of the United States Gypsum Company.

Justice STEPHENS. I see. I can't ask you to produce the impossible. It would save a great deal of time. Of course, the Court can't exact it, but it would save a great deal of time, Mr. Bromley, if, to the extent that you are informed, you could concede that these copies were taken from your files; if you could make a concession with respect to a number of them that might be shown to you, it would save a great deal of time in this circumstantial identification.

If the witness can testify that he remembers receiving information such as is contained in the letter, and you admit that it comes from your files, I think that is sufficient circumstantial identification, regardless of the absence of signature; and my fellow Judges agree with me on the subject.

Couldn't you come to some stipulation? Have you

873 got a lot of letters of this sort?

Justice JACKSON. Why not ask the question as you tender each one to Mr. Bromley?

Mr. BROMLEY. That is the safest way.

Justice STEPHENS. That is a good idea.

Mr. STEFFEN. That applies to Mr. Oliver also, does it?

Justice STEPHENS. Mr. Oliver can't answer that question, because he doesn't have possession of the files of the United States Gypsum Company.

By Mr. STEFFEN.

Q. Mr. Griswold, do you recall having received that letter?

A. I do not recall having received that particular letter. There is nothing on it to indicate that I did receive it.

Mr. STEFFEN. Mr. Bromley, do you agree that this copy came from the files of the United States Gypsum Company?

Mr. BROMLEY. Yes. sir,

Mr. Steffen. I now offer Government's Exhibit No. 134 in evidence.

Mr. OLIVER. I object.

Justice STEPHENS. We think, in view of the concession of Mr. Bromley as to the sources of the copy, and in view of the internal contents of the letter, that it is circumstantially identified, and it is received in evidence.

Mr. OLIVER. And at the same time, may I have a running objection to this class of exhibits?

Justice STEPHENS. You may; you may note a running objection for Mr. Oliver to this class of exhibits for the Celotex Corporation.

This is received, of course, subject to the same general restriction with respect to declarations of alleged co-conspirators.

(The letter marked as Government's Exhibit No. 134 was received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 135, which is D-37, and which purports to be a letter from you, Mr. Griswold, to Mr. Avery, under date of February 5, 1927, acknowledging receipt of a letter of February 2, and ask if you can identify that as your letter?

A. Yes.

Mr. Steffen. I now offer Government's Exhibit No. 135 in evidence.

Justice STEPHENS. Received in evidence, subject to the general restrictive ruling with respect to declarations of co-conspirators.

(The letter marked as Government's Exhibit No.

875 135 was received in evidence.)

# By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 136, which is D-41, which is in the form of a photostatic copy of what purports to be an original letter of March 24, 1927, from Mr. Griswold to Mr. Williams of the National Gypsum Company, and we also have put under the same number what purports to be a copy of Mr. Griswold's letter of that date.

Justice STEPHENS. This is March 24?

Mr. STEFFEN. March 24-D-41.

Justice STEPHENS. The only thing in this file is the purported copy, not the purported original.

Mr. Steffen. I would like to make a statement that the copy, Government's Exhibit No. 136, was taken from the files, under subpoena, of the American Gypsum Company. The photostatic copy which we have was taken from the files of the National Gypsum Company. Under our subpoena we asked, of course, for all original papers, and these are the papers that were furnished us, and no other papers were forthcoming.

Justice STEPHENS. I am sorry, Mr. Steffen, you will have to repeat that. I had my attention on this file, trying to find that letter. Judge Jackson's file has the purported copy of the American Gypsum Company's letter to Williams, and also the copy, and mine doesn't have the original.

Now will you just repeat that, if you will?

which we obtained from the files of the American Gypsum Company, and we are offering a photostatic copy of the same letter which was taken from the files of the National Gypsum Company.

Justice Jackson. As one exhibit?

Mr. STEFFEN. Yes, as Government's Exhibit 136. If more convenient we will offer it as two exhibits.

Justice STEPHENS. You had better mark them A and B, one 136-A and one 136-B

Mr. Steffen. I will do that. The copy is 136-A, and the photostatic copy is 136-B.

We are offering the carbon copy which was taken from the files of the American and Celotex companies as 136-A, and the photostatic copy of the original which came from the files of the National Gypsum Company as 136-B.

By Mr. STEFFEN.

Q. Can you examine those Exhibits 136-A and 136-B and

state whether or not you wrote such a letter?

A. I would say that that is a copy of it, a photostatic copy of the original letter which I wrote to Mr. Williams (indicating Government's Exhibit 136-B).

Q And would you say that 136-A is a carbon copy of

the same letter?

A. As far as I can see, they are exactly the same. One is a copy of the other. They apparently are the same, the copy and the photostat.

Mr. OLIVER. Mr. Steffen, may I see the copy?
Mr. FINCK. We will admit that this letter came from the files of the National Gypsum Company.

Justice Stephens. Thank you. You are talking about 136-B?

Mr. FINCK. It is the photostat of the original letter.

Justice STEPHENS. That is 136-B, and Mr. Finck admits that that comes from the files of the National Gypsum Company.

Mr. STEFFEN. And the witness has testified that he signed and sent such a letter.

We offer Government's Exhibits 136-A and 136-B in

evidence.

Justice Stephens. Let the Court read them, please.

Mr. Steffen. I will read them to the Court, if you wish.

Justice Jackson. If you read one, you have read both, haven't you?

Mr. Steffen. Yes, I didn't intend to read both.

Justice STEPHENS. Let me glance through it first, so that I can make a ruling.

They may be received subject to the usual restriction with respect to the declarations of alleged co-conspirators.

878 (The letters marked as Government's Exhibits Nos. 136-A and 136-B were received in evidence.)

Mr. Steffen. The letter is of sufficient importance that I think I should read it.

(At this point Mr. Steffen read Government's Exhibit No. 136-B to the Court.)

879 By Mr. Steffen.

Q. I now show you Government's Exhibit 137 which purports to be a copy of a letter from the American Gypsum Company, addressed to the National Gypsum Company under date of April 22, 1927. This is D-43. I ask you to read it, Mr. Griswold, and state whether or not you may have sent an original letter of that type.

A. I cannot identify this as being a copy of the original

letter. It has nothing on here to substantiate that.

Q. Will you say whether or not you wrote a letter containing those statements?

A. Yes.

Mr. Steffen. I offer Government's Exhibit No. 137 in evidence.

Mr. FINCK. If Your Honor please, I object to Exhibit 137 on the ground that there is no showing here that it was ever received by National Gypsum Company.

Justice STEPHENS. It was not taken from your files?

Mr. Finck. No, it was not, and the witness says he cannot identify the letter. It seems to me that if he wants to take the testimony of the witness, that is all right, but I see no reason why his letter should be admitted.

Justice STEPHENS. Read the witness' answer to Mr. Steffen's question, please, Mr. Reporter. I missed the first part of it. I was talking to one of my colleagues.

(.The record was read as requested.)

Mr. STEFFEN. I would like to make the point, Your Honor, that if we don't offer this as having been received by National, it would still constitute a declaration of a co-conspirator if, in fact, Mr. Griswold did write such a letter.

Justice Stephens. The Court thinks that the letter itself is not admissible for lack of any identification, but of course you may ask this witness to testify, and in fact he has already in effect testified, that he did, as president of the American Gypsum Company, or as an official of the American Gypsum Company, make such statements as are contained in that letter. You have then accomplished the same purpose, but the letter itself is not admissible.

Objection sustained.

Mr. Steffen. In order to let the transcript show what Mr. Griswold's testimony is, I will have to take the letter up, item by item.

Justice STEPHENS. You may properly use it to refresh his recollection as you see fit.

## By Mr. STEFFEN.

Q. Did you, Mr. Griswold, under date of April 22, or thereabouts, write a letter to the National Gypsum Company, attention of Mr. J. F. Haggerty, in which you said, among other things, "For your information will say"—

Mr. Adams (interposing). We object to this kind of procedure, Your Honor. I don't think that he can just read the letter to him. I think he has to show him the letter and ask him if it refreshes his recollection. He previously testified that he can't identify the letter at all, and Mr. Steffen starts off and says, "Did you write a letter stating as follows"—and he has already testified that he cannot identify the letter.

Justice Stephens. It would save a great deal of time, and it is the usual practice in situations of this sort, to ask the witness if he did write a letter on or about that date, and let him see the letter, let him read it, and then ask him if it refreshes his recollection. If he says it does, ask him if he wrote a letter in substance and effect acquainting the National Gypsum Company with this information. You might just as well read the letter into the record; or offer it in evidence, as to do what you are doing now, and we can't permit that.

# By Mr. STEFFEN.

Q. Well, Mr. Griswold, I believe you have testified that you wrote a letter on or about April 22, 1927, to the National Gypsum Company, is that correct, according to your recollection?

Mr. Adams. I don't think he testified that way; my recollection may be wrong, but I think he testified that he wrote a letter.

Justice STEPHENS. We will see what he says. Take you time and read it, Mr. Griswold.

The WITNESS. Yes, I wrote a letter containing, as I remember it, the general statements that are made in this letter, but, as I stated before, I cannot identify this par-

ticular letter, I have no recollection of it. There is nothing on it to refresh my memory, or a check that I did receive it.

Justice Stephens. Do you remember about when you wrote it?

The WITNESS. I would say at about this time, because the evidence, if that is correct, is that I referred to a decision that had just been in the courts or the Patent Office, and that checks with what I remember of the decision as it came out. So I assume that it is correct.

## By Mr. STEFFEN.

Q. Do you know what the decision is that you referred

to, or between what parties the litigation was?

A. I am under the impression that there was some discussion, some legal matter between the Universal Gypsum Company and the National Gypsum Company, that had been up for argument before the courts or some place else, and had just been settled. I state here that I just learned of the decision, and I think that was the case it had reference to, it, was their own troubles, nothing that I had anything to do with.

Q. I direct your attention to the last paragraph of the paper I have shown you, Exhibit 137, and ask you if you may have written a letter in which you stated that you were authorized to act as intermediary between the National Gypsum Company and Universay Gypsum

Company, about this litigation.

A. Yes, I remember writing—Mr. Holland, who was receiver for the Universal Gypsum Company, had authorized me to discuss—I didn't want to dip into somebody else's trouble, trouble between two companies, and Mr. Holland authorized me to discuss with them the differences that they had.

Q. Did you write the National Gypsum Company that among your purposes was one of bringing about peace and harmony in the industry, in the wall board situation—

do you remember that?

A. I would say yes, that is correct.

Q. Do you remember whether you mentioned in your letter to the National Gypsum Company that you had recently seen Mr. Palmer, president of the Universal Gypsum Company?

A. No, I do not remember, other than what the letter

indicates here.

Mr. Adams. I move to strike out the answer. He has testified that he can't remember the letter.

Justice STEPHENS. Since the answer states that he does'nt remember, the answer doesn't do any harm.

Mr. Steffen. If you want it stricken out, though, Mr. Adams—

Justice STEPHENS (interposing). . It may go out.

Mr. Bromley. Could we have it brought out at this time, in the interest of clarity, that this letter has nothing to do with the United States Gypsum Company or the license agreements, whatsover?

Mr. STEFFEN. Your Honor, I think that is appropriate upon cross-examination, and I think it probably comes better on final argument.

Justice Stephens. I suppose, Mr. Bromley, unless the letter is to be introduced in evidence, about the only way you can do it is by cross-examination on it.

Mr. OLIVER. And along the same line, I would like to point out that it has nothing to do with American.

Justice STEPHENS. You should make a note of that, and bring it to the attention of the Court on cross-examination.

Mr. Steffen. May I say that we are forced, in a conspiracy case, to bring in one company after another, and that it will only appear, the relevancy in many of these instances will only appear, after we have put in a great deal of evidence. We propose to go through with each of the several companies, one after another, and the thing will tie in together at the conclusion.

885 By Mr. Steffen.

Q. I now show you, Mr. Griswold, Government's Exhibit 138, which is D-56, which purports to be a letter from you to Mr. J. H. McCrady, under date of December 27, 1927, and I would like to ask you to read it carefully and state whether that is your letter.

Justice Stephens. Just one moment. The Court should have noted, in respect to Mr. Griswold's answers to the questions just preceding the one now asked, that they are also admitted, subject to the usual restriction with respect to declarations of co-conspirators. So far, the rulings have had to to only with exhibits, but the ruling applies also to oral testimony.

The WITNESS. Yes, this is an original letter written by me to Mr. McCrady.

Mr. Steffen. I offer Government's Exhibit 138 in evidence.

Justice Stephens. Received in evidence, subject to the general restriction on declarations, already announced.

(The letter referred to, marked Government's Exhibit No. 138, was received in evidence.)

#### By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 139, which purports to be a copy of a letter from you to Mr. McCrady under date of March 16, 1928, which is D-58, and ask you to read that and I will ask you one or two questions concerning it.

A. Well, I remember writing Mr. McCrady, he being president of the company, and reporting to him on condi-

tions

Q. (Interposing.) I don't ask you to identify the letter.

I simply wanted to ask you one or two questions.

How did your company keep their records concerning the amount of gypsum mined, on a tonnage basis or was it on any other basis?

A. We kept it on a tonnage basis.

Q. Could you tell the Court roughly about what the tonnage of gypsum was that you were producing in 1927 and 1926?

A. Well, I would say between three and four hundred

tons per day.

Q. I think you have so testified. Does that refresh your

recollection in regard to the amount for the year?

A: This tonnage here refers to finished product, which contained other materials which we had added, and when it was put over the scales, that increased the tonnage. In other words, the tonnage of the finished product shipped might have been in excess of the amount of raw gypsum, for the reason that we were shipping ready-mixed sand and plaster, that contained two parts of sand to one part of gypsum, which increased our tonnage quite materially.

Q. Therefore your tonnage figures there covered

887 plaster and what other products?

Justice Jackson. That is indefinite, isn't it?

Mr. STEFFEN. I think it is.

Justice STEPHENS. Are you talking about tonnage mined or shipped?

Mr. STEFFEN. If you will allow me to ask a question to straighten it out, I will do so.

#### By Mr. STEFFEN.

Q. Will you tell me whether, in figuring your tonnage records, did you include more than plaster, or did you in-

clude only plaster?

A. Every product that we manufactured and shipped was boiled down to a tonnage basis, so many tons, boards, blocks, every product that we put out, in my report to the company itself.

Q. Now, did your tonnage figures in 1927 compare favorably with those in 1926, or not?

Mr. Bromley. I object to that as immaterial. I don't understand the purpose of it at all.

Justice STEPHENS. What is the purpose?

Mr. Steffen. Well, the purpose is generally to show that the practice of the American Gypsum Company, and I think of all gypsum companies, is to treat their business as one of producing gypsum rock, and they sell it on a ton-

nage basis, and I want to follow this question up with some question concerning the price situation in the territory at the time. This is a preliminary question, and not very material.

Justice STEPHENS. We think it is admissible, Mr. Bromley; it follows the general allegations in the complaint. The objection is overruled. You may answer the question.

Mr. STEFFEN. Will you read the question back, Mr. Reporter?

(The pending question, as above recorded, was read by

the reporter.)

Justice STEPHENS. I may add, Mr. Steffen, that the Court hopes you will not have to go into any too great detail about it. The comparison of years may be connected with some other matter, but you are entitled to prove the general allegations of the complaint.

The WITNESS. Without referring to the letter, I would say that the tonnage compared very favorably with what we had had for the preceding year.

#### By Mr. STEFFEN.

Q. And by "the preceding year" you mean\_\_\_\_

A. (Interposing.) The year before this, the year 1925. That is what I had reference to as the "preceding year."

Justice Jackson. This question doesn't have reference to the tonnage mined, but refers to the tonnage of the finished products shipped?

#### By Mr. STEFFEN.

889 Q. When you speak of "tonnage"—

A. (Interposing.) I have made no reference in my report to the number of tons of rock mined, it was the tons of finished product, and every product we shipped was included in those figures given, no matter what it was.

Justice Jackson. Now it is clear.

By Mr. Steffen.

Q. And did your tonnage of finished product increase or decrease in 1927 and in 1928, if you can tell?

A. Without referring to this letter, I don't remember,

that is to far back.

Q. Well, let me ask you whether prices were stable at about the time of this letter, March 16, 1928, if you remember.

A. I would say they were not, that the disturbance in the price situation was in effect at that time. Just how long it had been going on, I cannot say, but I am sure there was considerable disturbance in prices by that time.

Q. And did that disturbance in price affect only one line

of your production, or did it affect all lines?

A. Well, it affected more than one, but I don't think it affected all, as I remember it, but it did affect more than one line.

Q. Well, was it in effect as respects board, for example?

A. Well, the price of board was affected, I am very sure, in 1928, at the time this letter was written.

Q. Was the price of plaster affected in 1928?

A. Well, I could not say offhand, Mr. Steffen, without referring to something that would refresh my memory, because that is too many figures, but on general conditions, I imagine—

Q. (Interposing.) I don't want you to state what you

imagine, but what you recollect.

A. I can't say offhand without reference to something to

refresh my memory.

Q. Thank you. I now show you Government's Exhibit No. 140, D-59, which purports to be a letter from you, Mr. Griswold, to Mr. McCrady, under date of April 2, 1928, and ask you to read it carefully and state whether or not it was a report you made to Mr. McCrady.

Justice STEPHENS. The Court will be in recess for a few moments.

(At this point a short recess was taken, at the conclusion of which the proceedings were resumed.)

Justice STEPHENS. The Court is in session. Proceeds gentlemen.

By Mr. STEFFEN.

Q. Mr. Griswold, I would like to now call your attention to Government's Exhibit No. 141, being D-61, which purports to be another report made by you to Mr. McCrady, this time under date of April 12, 1928, and would

ask you to examine it and state whether or not it

The

is your report.

A. I cannot-

Justice Stephens (interposing). Just a moment, please. Let me finish reading it, please, Mr. Griswold.

The WITNESS. Certainly.

Justice Stephens. Proceed.

By Mr. STEFFEN.

Q. Have you had an opportunity to examine Government's Exhibit No. 141, Mr. Griswold?

A. I am just reading it.

Q. Have you completed reading it? A. Practically so, I am nearly finished.

Q. Take your time and read it all clear through.

- A. I cannot say that that is a copy of the letter I wrote, because there is no signature, that is, my signature is not on it.
  - Q. Do you recognize the initials there on the left?

A. Yes, my initials are on the left corner of the letter.

Q. What do the initials "AS" stand for, if you know? A. Those were the initials of the stenographer.

Q. Upon examining the contents of the memorandum, can you state whether or not you wrote a memorandum concerning those matters?

A. Yes, I remember writing Mr. McCrady, who was president of the company, with regard to some of 892 the matters that are mentioned here in this letter.

Q. Which ones do you have in mind, when you say

that? A. I was telling him with reference to the proposed license agreement. The word used in a lot of this correspondence is "agree" to do certain things, which is improper. It was a meeting of these different manufacturers to consider whether that was the best thing to do to correct all this trouble and litigation and expense that there was in the company, and I remember writing him along those lines.

Q. And when you used the word "agree" what did you

mean by that?

A. By "agreement" it is usually something that people are willing to sign; it was simply a talk of these different manufacturers over the troubles they were having among themselves, and whether or not the fact that Mr. Avery of the United States Gypsum Company had at this time, I think, been awarded the decision over us, especially in the Patent Office, and he had started suit against—either had or threatened to start suit against—the Niagara Gypsum Company and any of those manufacturers who were making board either under the Birdsey patent, or trying to make a closed-edge type of any kind, he threatened to start injunction suits against them, or infringement suits.

Q. Now correct me if I am wrong, and state whether or not by the use of the word "agreed" you meant simply that they had come to a general understand-

ing, but that there was no contract signed.

A. Well, I wouldn't say "come to a general understanding." It was the result of a conference in which they thought it was the best thing to do for their individual companies, to allow them to go ahead and manufacture the board, without litigation, which was costing us a lot of money, and the decision had gone against us at that time, as I remember it.

Q. Now, do you recall having reported to Mr. McCrady that you were in New York about this time and saw Mr.

Brown of the Certain-teed people?

Mr. Bromley. I would like to add to the general objection with respect to both Exhibits 140 and 141 for identification, and their contents, if he is seeking to prove them this way, the further objection that these statements were not made in furtherance of any conspiracy, and constitute at most a mere narrative of past or current events.

Mr. STEFFEN. If I may say, in reply to that, Your Honor, meetings of manufacturers of wall board at which they discussed license agreements with the idea of getting even litigation settled, or any of the other difficulties in the industry settled, looking toward a uniform contract under the license agreements, would seem to me to be highly promotive or favoring or furthering the conspiracy which finally, as we claim, took full flower in 1929.

Mr. Bromley. That is not the question. If he wants to ask this witness what transpired at meetings, I of course would not have this present objection to it.

He is asking this witness to state what he told McCrady, which is a mere narrative and of course not made in furtherance of any conspiracy.

Justice STEPHENS. It is difficult for us to determine at the present time whether this is in furtherance of the conspiracy. It may be, and it may not be, if a conspiracy is proved. But we think at the present time the objection ought to be overruled, and the statements of the witness may remain in as declarations of an alleged co-conspirator, subject to the usual restriction on that ruling.

Mr. Steffen. Now will you please read my pending question, Mr. Reporter?

(The pending question, as above recorded, was read by

the reporter.)

The WITNESS. Yes, I have an indistinct recollection of writing—

Justice STEPHENS (interposing). I think you must have misunderstood the question. You were asked if you remembered having been in New York.

Mr. STEFFEN. No, of having reported as to that, Your Honor.

Justice Stephens. I beg your pardon, I misunderstood.

895 By Mr. Steffen.

Q. And your answer is that you have an indistinct recollection?

A. I do.

Q. Do you recall having reported to Mr. McCrady that you had discussed with Mr. Brown the licensing agreement?

A. As I remember it now, I did.

Q. Do you recall what Mr. Brown's attitude was at that time toward the licensing agreement?

Mr. ADAMS. We object to that as incompetent and immaterial and calling for a conclusion.

Justice Stephens. Ask what Mr. Brown stated in substance and effect.

By Mr. STEFFEN.

Q. Do you remember what Mr. Brown stated, in substance and effect, concerning the license agreement?

A. Not without something to refresh my memory on the proposition.

Q. Did you speak of the Ebsary Gypsum Company at that time, in talking with Mr. Brown?

A. I could not say, without something to refresh my

memory.

Q. Will you look at the second paragraph of Government's Exhibit 141 for identification and see if that refreshes your recollection?

A. It does with reference to Mr. Brown, with ref-896 erence to talking to Mr. Brown.

Q. Can you say now whether or not you and Mr. Brown discussed the Ebsary Gypsum Company?

A. I couldn't say whether we discussed it at that time

or not.

Q. Do you recall having discussed it with Mr. Brown at any time?

A. I cannot recall any definite time, but I will say that

it was discussed possibly at some time, with Mr. Brown.

Q. Well, I don't want you to say "possibly at some time," but do you or do you not recall ever having discussed with Mr. Brown, the Ebsary Gypsum Company and whether or not it might take out a license?

A. Yes, I think I did.

Q. All right, state what that conversation was.

Mr. ADAMS. May we first have it indicated when it was?

Justice STEPHENS. Can you tell about when it was and about where it was? You don't have to state the exact day, Mr. Griswold, we don't expect you to remember the impossible.

The WITNESS. Well, I would say that it was probably along about April 12, 1928, as I am writing Mr. McCrady the result of the meeting.

Mr. ADAMS. I respectfully move to strike out the answer as a mere speculation on the part of the witness.

Justice STEPHENS. I think the objection goes to the weight, Mr. Adams. I think the witness' answer may stand.

By Mr. STEFFEN.

Q. Now tell us, if you can, what your conversation with, Mr. Brown was concerning Ebsary becoming a party to the agreement, the license agreement.

A. I couldn't say without refreshing my memory.

Q. Well, look at the second paragraph of Government's Exhibit 141 and see if that refreshes your recollection. Perhaps you should also read the first paragraph of the letter in this connection, Mr. Griswold.

A. Now state your question.

Q. Now, the question is whether, at a meeting with Mr. Brown at some time, you discussed with Mr. Brown whether he woluld join the licensing agreement and whether he discussed whether Ebsary would become a party to the licens-

ing agreement.

A. I discussed with Mr. Brown the advisability of his taking out a license agreement and manufacturing a closed-edge board instead of trying to make an open-edge, which he was making at the time, and, as I remember, was selling at a pretty low price, like all the rest of the manufacturers. As I remember it, Mr. Brown at that time stated that if all of the other manufacturers, or certain ones of them, took out a license, that he might possibly consider it,

898 but he felt that his competitors, especially since Ebsary and the Certain-teed Products were pretty hot competitors in that territory, he felt they should both

be licensed.

Justice Stephens. Who is Mr. Brown connected with, Ebsary?

The WITNESS. He was president of the Certain-teed Products.

Mr. ADAMS. There were two Mr. Browns. He might indicate which one it was.

By Mr. STEFFEN.

Q. There was a Mr. George Brown and a Mr. C. O. Brown?

A. This was Mr. George Brown.

Q. Having read Government's Exhibit No. 141, can you identify it as a report which you made to Mr. McCrady?

A. Well, I can identify it as the substance of the letter, but I can't identify that as being a copy, an exact copy, of the original. There is no signature of mine on there, and the initials were copied by the stenographer, so I didn't put that there, but the substance of the letter was what I had reported to Mr. McCrady.

Mr. STEFFEN. We offer at this time Covernment's Exhibit No. 141, which was taken from the files of the American Gypsum or Celotex Company.

Mr. AD Ms. We object to it on the same grounds as we indicated vesterday with reference to a similar ex-

899 hibit. It is not identified as being a letter which he knows that he wrote, and it certainly is not sufficiently identified to be a letter within the rule of past recollection recorded.

Mr. Browley. To the general objection and to Mr. Adams' objection, I would like to add the further objection that it was not written in furtherance of any conspiracy.

Justice STEPHENS. Well, as to the objection that it was not written in furtherance of the conspiracy, the Court will overrule that at the present time. We can't tell piecemeal what will or will not appear to be in furtherance of the conspiracy. You may and ultimately will move, I assume, to strike all of these declarations if, in your view,

no proof of conspiracy has been made.

As to your objection, Mr. Adams, we think that the exhibit has now been sufficiently identified to make it proper to admit it as embodying the substance of a report which was made to Mr. McCrady by this gentleman who is now on the witness stand. He says that he did write such a report, he has read it carefully, and he remembers reporting those things to Mr. McCrady. It bears his initials and his stenographer's initials, and it seems to us that it is cutting it a little too fine to exclude evidence of that sort. It may be received in evidence as embodying—it is not received in evidence as having been identified as an original letter sent

by this witness—but it is received in evidence as embodying, as the witness states, the substance of

a report which he made to Mr. McCrady.

Objection overruled. It is of course received subject to the usual restriction that unless there is prima facie proof of a conspiracy, it will not be considered; that the declarations themselves don't prove the conspiracy.

(The document referred to, marked Government's Ex-

hibit No. 141, was received in evidence.)

Justice STEPHENS. We will now recess until 1:45. The Marshal will announce the recess.

(Thereupon, at 12:15 o'clock p. m./ a recess was taken until 1:45 o'clock p. m. of the same day.)

#### AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p. m., pur-901 suant to recess.))

Justice STEPHENS. The Court is in session.

Mr. Oliver and Mr. Adams, do you want to make some record of the matter concerning which you spoke to me?

Mr. ADAMS. I don't know that it is particularly necessary. There is certainly no objection to it. It is just that Mr. Oliver has to be away for two or three days next week, and asked me if I would, so far as I could, take over in his absence, and I suppose that will happen from time to time with respect to myself and perhaps other counsel. I just didn't want—

Justice STEPHENS (interposing). It is thoroughly agreeable to the Court that, in Mr. Oliver's absence, if it is agreeable to you two gentlemen and your clients, you speak for your client and Mr. Oliver's client; and vice versa, in the event of your absence.

Mr. ADAMS. Thank you very much.

Justice STEPHENS. Proceed, gentlemen.

Thereupon, FRANK J. GRISWOLD, the witness on the stand at the time of the recess, resumed his testimony as follows:

Direct examination (resumed).

902 By Mr. STEFFEN.

Q. I now show you, Mr. Griswold, what has been marked for Identification Government's Exhibit 142, which is D-66, which purports to be a copy of a report you made to Mr. McCrady under date of June 18, 1928, and I would ask to have you examine it carefully and state, if you can, whether that is a copy of your report?

A. There is nothing about this-

Justice Stephens (interposing). Just a moment, let us read it, Mr. Griswold.

Very well.

By Mr. STEFFEN.

Q. I direct your attention to the subject matter of the report, and ask you if you recall having made a report in that form to Mr. McCrady?

Justice Stephens. What number is this exhibit?

Mr. STEFFEN. Government's Exhibit 142.

The WITNESS. Yes, I made reports to Mr. McCrady, but I can not identify this particular report.

By Mr. STEFFEN.

Q. Do you mean by that that you can not identify the paper you have in your hands, or you are not familiar with the subject matter discussed in that paper?

A. Well, in a general way I remember the subject matter in the letter.

Q. Can you say whether or not you ever made a report to Mr. McCrady in substance and effect as

that paper is?

A. I say to the best of my recollection that I did make a report of this nature to him. Whether this is the exact copy of it or not, I couldn't say.

Justice Stephens. Are those your initials in the left-hand corner?

The WITNESS. Yes, FJG.

Justice STEPHENS. Did you have a stenographer at that time with the initials indicated there?

The WITNESS. We did.

Mr. STEFFEN. This paper was taken from the files of the American Gypsum Company under subpoena, and I offer Government's Exhibit No. 142 for substance and effect.

Justice STEPHENS. Mr. Oliver, do you concede this was taken from the files of American, which was acquired by Celotex?

Mr. OLIVER. No, because I don't know, Your Honor. I would like to ask a question, whether or not the paper Mr. Steffen has shows that the first sentence is incomplete?

Mr. STEFFEN. I don't get your question.

Mr. OLIVER. The question is whether or not the first sentence in that document is incomplete?

Mr. STEFFEN. It is, as we have it here.

Mr. OLIVER. You see, Your Honor, I don't know-

Justice STEPHENS (interposing). I understand that, we don't expect you to stipulate if you don't know, but the Court has no reason to doubt the statement of Government counsel that it was so taken, and in the absence of that we think it may be received in evidence as embodying the substance of a letter written by Mr. Griswold.

Mr. ADAMS. May I have an objection to it, Your Honor? Your Honor has indicated that you are going to admit it, but I would like to have an objection to its admission.

Justice STEPHENS. You may object.

Mr. ADAMS. On all the grounds that we stated with reference to the previous exhibit on the same subject matter, and the further objection of Mr. Bromley that it merely amounts to a narrative. It couldn't conceivably be in furtherance of the conspiracy.

I would like to indicate for the record that the exhibit shows on its face that it is largely a matter of rumor, and I call the Court's attention to the sentence which says:

"There has not been to our knowledge any direct movement made in the way of raising prices, but there are rumors all over the country that salesmen of both the Certain-teed and the U. S. G. Companies within the last ten days or two weeks have been advising contractors on specific jobs to get their orders in as prices are going to be advanced. These rumors come from all parts of the country "", and so on.

It seems to me that that should be called to the Court's attention as indicating the fundamental vice

in receiving this type of evidence.

Justice Stephens. Well, the objection will be overruled, Mr. Adams. It may turn out that the exhibit has no weight; but it may, on the other hand, if connected with other exhibits and brought to the attention of other alleged co-conspirators, indicate a common knowledge and current talk which was in the direction of promoting a combination. We can't foresee that. I think the objection goes to its weight.

It may be received in evidence subject to the general restrictions which we are making upon this type of exhibit

and testimony and evidence.

(The document marked as Government's Exhibit No. 142 was received in evidence.)

## By Mr. STEFFEN.

Q. I now show you, Mr. Griswold, Government's Exhibit 143, which has been marked for Identification, and which is D-67; and it is a copy of a purported report which you made to Mr. McCrady under date of July 2, 1928. I would like to have you examine it carefully and I will then ask you some questions concerning it.

Justice STEPHENS. Of course, I take it, Mr. Steffen, that you are not offering this exhibit and the previous exhibits to prove the state of prices. That could be testified to directly by this witness so that he could be cross-examined on it.



Mr. Steffen. That is right.

By Mr. STEFFEN.

Q. I want to ask you, Mr. Griswold, whether you recall having made a report to Mr. McCrady at about this time concerning the matters which are related in this memorandum, Government's Exhibit No. 143?

A. Yes.
Q. You have examined the exhibit throughout, have you?

A. Yes.

Q. And does it embody, in substance and effect, the report which you made to Mr. McCrady?

A. I would say yes.

Mr. Steffen. I offer Government's Exhibit 143 in evidence.

Mr. ADAMS. May I have the privilege of a brief preliminary examination?

Justice STEPHENS. Yes. You mean on voir dire of the witness himself as to his familiarity with the document?

Mr. ADAMS. That is the sole purpose of it, Your Honor.

By Mr. ADAMS.

Q. Mr. Griswold, this Exhibit 143 that you have in your hand, you don't remember that at all, do you, you don't

remember the paper at all?

A. I can not identify the letter itself, the paper. 907 itself, as there is nothing on here to indicate that I did, no marks that I put on it or my office put on it.

Justice STEPHENS. What is this across the bottom of the exhibit before us, "signed FJG". Is that on yours?

The WITNESS. It is on mine.

Justice Stephens. Is that in your writing?

The WITNESS. No, that is not my writing.

By Mr. ADAMS.

Q. Now you said that you made a report to Mr. Mc-Crady, but you can't tell us that this is the report, can you?

A. I can't what?

Q. You can't tell us that this is the report that you made to Mr. McCrady? I will put that again. You teld us that you made a report to him, but you can't tell us that this paper that you have, Exhibit 143, is or is not the report, can you?

A. No, I can not.

Q. Now when you read it over, do some of the things come to your mind as being things that you knew at that time?

A. Yes.

Q. And are there many other things there that you don't have any recollection at all about, now?

A. Well, I would say yes.

Q. There can be no question about that, can there,
908 Mr. Griswold, that there are only a few of those
things that are in that report that you remember
now: isn't that right?

A. Well, I would say that I remember fairly well the different subjects that are commented on here as having

been reported to Mr. McCrady.

Q. That is right, but you can't remember what the comment was, can you? You can remember the subjects but you don't remember what you said; isn't that the true way of putting it?

A. Not without referring to some letter or something.

Q. So that your position about this exhibit is, as I take it, that you can tell us that generally you reported to Mr. McCrady on the subject matter that is mentioned in the exhibit, but you don't know what the report that you actually made was, do you?

A. Only as indicated by this, and I can't identify that as

being a definite copy of the original.

Q. And you can't identify this paper as being something which you prepared and dictated, can you?

A. No, I can not.

Q. Now, Mr. Griswold, if, in this letter, you referred to a conversation with some particular person, you have no present recollection about that conversation, have you?

A. You say if I referred——
Q. (Interposing.) Yes, if you referred to it.

909 A. Not without something to refresh my memory,

I wouldn't.

Q. And this letter, you say you can't identify as being something which you dictated, which is the product of your mind?

A. Not by the paper that it is written on, there is nothing to indicate that this came from our office even; it may have, but I don't know.

- Q. I want to state this, if I can, as fairly as possible, but as I see it, you are in the position where you tell us that you recall that you made a report to Mr. McCrady, is that correct?
  - A. That is correct.

Q. You can't tell us that this is the report at all, can you,

we are agreed about that?

A. Well, in substance I have already said that I remember having reported, but whether it was at this time and whether this is a particular copy of it, I can not say.

Q. All you can tell us is that you covered the subjects

that are mentioned here?

A. In my report to Mr. McCrady, that is right.

Q. But you can't tell us that what is contained in that letter is what you told Mr. McCrady, can you?

A. I would say I couldn't say that I remember all of it, there are some of the parts of it that I remember.

910 Q. And others that you do not?

A. Others that I do not remember now.

Q. Well now, Mr. Griswold, when you have been talking here to day about other exhibits, suppose we take the one that went in just before, Exhibit 142—

Mr. Steffen (interposing). I think we might stay with this exhibit.

Mr. ADAMS. I am not trying to cross-examine on the subject matter which is contained in the letters, I am trying to

Justice STEPHENS (interposing). I understand what you are doing, and you have a right to see whether the witness' recollection of this exhibit is such as to make it properly admissible in evidence, as such, rather than calling upon him to testify. But I don't think we had better go back to the other exhibits. The Court has ruled upon those, and the Court is satisfied concerning those.

You may proceed with respect to this one, if you want to.

Mr. Adams. Well, I am depating Your Honor, the desirability of asking for an opportunity to reconsider those exhibits, in the light of the testimony of this witness with respect to this exhibit. I think that under the circumstances of his answers with respect to this exhibit, and also Exhibit 103, I think it was, concerning which we had some discus-

sion yesterday, that while I am reluctant to trouble the Court in that respect, I think I must apply for

that permission.

911

Justice STEPHENS. Well, you are at perfect liberty to trouble the Court whenever your client's interests, in your opinion, require it; but the other exhibits are different from this one. The Court has some question about this one, but the other exhibits had something about them, physically,

that helped the witness to identify them as having been written by him. This has nothing of that sort. Of course, when you get to cross-examining this witness, you can go over all of these exhibits again, and if you can bring out at that time that he doesn't remember anything about them, you can move to strike them; but I think we ought not to reopen all these other exhibits that we have just gone through.

Mr. ADAMS. I agree that there is that difference with respect to most of the others, as I recall it. Of course, here he says that these initials are not put on by him, and that does make a difference in that respect.

That is all the questions I have at this time, Your Honor.

Thank you.

Mr. Steffen. To clarify the matter, Your Honor, I can further ask the witness concerning the particular matters that he has in mind and has remembered.

Justice STEPHENS. Let me state what I think are the views of both of my colleagues and myself with respect to this exhibit and this class of testimony. Of course,

912 we realize the difficulties you are under with these events far in the past, and the witnesses can't be expected to remember everything. On the other hand, the case must be proved according to the rules of evidence:

Now so far as the rulings past are concerned, we think they are correctly made. In respect of this letter, we have a grave question as to whether this letter could come in itself, because the witness can't say that he wrote it, and there is nothing on it to indicate that he wrote it.

If you put the whole letter in, then you put your opponents to the disadvantage that they can't cross-examine a letter. To the extent that he can't identify it as having been

written by him, it is a form of hearsay.

However, if he can, by reading that letter, refresh his recollection as to having told Mr. McCrady of particular items referred to therein, you can call his attention to those portions of that letter and let him testify himself concerning them, and then he can himself be cross-examined on them.

By Mr. STEFFEN.

Q. Well, Mr. Griswold, you have testified that this report, Government's Exhibit No. 143, which I showed you, embodies in substance and effect matters which you reported to Mr. McCrady, and in answer to Mr. Adams' ques-

tions you have said that some of the things you didn't remember and some other things you have remembered.

913 I would like to ask you now to tell us which of the matters in this report are matters which you now remember having included in a report to Mr. McCrady?

Justice STEPHENS. Take your time, Mr. Griswold, don't be hurried about it. Look through the letter carefully and find out what portions you do now remember having told Mr. McCrady about, either orally or otherwise.

# By Mr. STEFFEN.

Q. I would ask you to consider the first paragraph, and ask you if you remember the things in the first paragraph as having been included in a report to Mr. McCrady?

A. Yes, I am sure I made that first paragraph of that

report to Mr. McCrady.

Q. Now let's look at the second paragraph, and see if there are any things in there that you do not remember having made or any things that you remember having made in a report to Mr. McCrady?

Mr. ADAMS. Do I understand that the question is whether he reported on the subject matter of the paragraph?

Justice STEPHENS. No, the question is whether he reported that matter which is contained in the paragraph.

Mr. ADAMS. Whether he said that to Mr. McCrady?

Mr. STEFFEN. In substance or effect.

Justice STEPHENS. Whether he said it or wrote it to him.

The WITNESS. Yes, the second paragraph I would say that I had reported to Mr. McCrady.

# By Mr. STEFFEN.

Q. Well, let's take the third paragraph, do you recall having reported that you were in Chicago on or about this

time, to Mr. McCrady?

A. No, I do not remember that, except as it refreshes my mind here that I probably discussed with him at some time that matter. Mr. McCrady used to be up to the office quite frequently, and I had, of course, frequent conversations with him.

Q. You have no recollection of having reported to Mr. McCrady as to the third paragraph, concerning Harris

Brothers? A. No. Q. Now let's take the fourth paragraph, and I ask if you can recall making a report, in substance, to Mr. McCrady as covered by that paragraph?

A. Yes, I remember reporting the information contained in that paragraph, but just whether it was in this letter or

some other one, I couldn't say now.

Q. Will you look at the paragraph at the bottom of the first page, and the top of the next page, and tell the Court whether you remember having reported to Mr. McCrady, in this report or in a conversation, that Mr. Avery would be interested in having everyone in the license agreement

100 percent, in substance and effect, as you have re-

915 ported it in this paragraph?

Mr. Bromley. I object to the form of that question, if the Court please. It seems to me the only proper procedure is to ask him whether he recollects reporting, and if he says yes, have him state what he reported. All he is doing now is reading the letter and saying "yes," having said he didn't remember the letter.

Justice STEPHENS. I was about to suggest, Mr. Steffen, that it seems to me we are getting again pretty far afield of the rules on this subject. Either this exhibit is admissible as past recollection recorded—under previous rulings it isn't admissible as that because it is a copy, it isn't identified as an original or authenticated—or it is usable, not admissible; but usable to refresh the recollection of the witness.

Of course, where he can identify it, as in the previous exhibits which have had his initials on them and stenographers' initials and letterheads, where he can identify the contents and say that he sent those as an officer of the company, then it is admissible as a declaration. But this exhibit isn't authenticated in any manner.

It seems to me that in clear obedience to the rules that you are using this as an item to refresh his recollection, that when he has had a chance to read it, as he has now, two or

three times, you ought to ask him what he reported to Mr. McCrady. Let him tell about it, and then dedefendants' counsel have an opportunity to cross-examine. Otherwise, you are really indirectly getting this in evidence, and it isn't really admissible in evidence.

Mr. Steffen. Well, I would expect to offer this as a report which embodied, in substance and in effect, the matters which—

Justice STEPHENS (interposing). The rulings thus far have admitted those reports because they were identified in some official manner as reports. All this witness says now concerning this item is that he remembers making some such report on the subjects of the various paragraphs which he has thus far described. He doesn't say when he made it. For the purposes of the Government, in any event, it is equally effective to have this witness state orally, if he can, what he told Mr. McCrady; and if he can't tell that, then I don't think the Government is entitled to put this in as an exhibit, since it isn't authenticated.

Mr. STEFFEN. If this was not to be admitted as an exhibit, I would expect, of course, Mr. Griswold's testimony to the effect that he did make such a report as being his present recollection that he made such a report, and as being evidence of the fact that he recites.

Justice STEPHENS. You are entitled to examine him further, you are entitled to ask him: "Now having 917 looked at this exhibit, Mr. Griswold, and refreshed your recollection as to what you reported to Mr. Mc-Crady, what was it you reported?"

By Mr. STEFFEN.

Q. Well, Mr. Griswold, I want to ask you what you did report to Mr. McCrady, and I want to direct your attention particularly to your conversation with Mr. Avery, which you have already testified you had, in Chicago; and what did you report as a part of your conversation with Mr. Avery, as you recollect it how?

Mr. Bromley. And quite apart from the letter, if the Court please.

Justice STEPHENS. We don't want you to read us the letter, Mr. Griswold. We want you to tell us as far as you can, we don't expect the impossible of you, we don't any o us remember back in 1926 with perfect accuracy. You have an excellent memory, but if you can refresh your memory by reading each paragraph of that letter, and it brings to your mind that you told Mr. McCrady something or Mr. Avery something, then tell us about it, but don't read the letter to us.

The WITNESS. I have already passed on the first four paragraphs of the letter, that that was substantially what I reported to Mr. McCrady. But generally those four paragraphs were what I had reported to Mr. McCrady as

to what had happened, and Mr. McCrady being the President of the company I had to report to him.

Justice GARRETT. Except as to the third paragraph.

Mr. STEFFEN. That is right.

By Mr. STEFFEN.

Q. I would like to ask if you can say whether you reported to Mr. McCrady the substance of the fifth paragraph?

Mr. Bromley. I object to that on the same ground. If he wants to take the letter away and have the witness tell us what he remembers about an item, that is one thing. But I don't think it is proper to have him read out of a letter.

Justice Stephens. We think that is true, Mr. Steffen. The Government is really trying to get in between the edge of past recollection recorded and present recollection refreshed. If you can identify the exhibit as a record of past recollection and authenticate it as an original, it can go in itself; if it refreshes his recollection it may be put in as illustrative of the material which he is refreshed upon; but it can't come in as an exhibit itself, it can't be considered as evidence, and when you ask the witness to read or to state merely that he told the substance and effect of paragraphs 1, 2 or 3 to Mr. McCrady, then you are reading that into the record, and that is an evasion of the rule.

I am sure you don't intent to evade, I don't mean that, but I think you will have to ask this witness to tell us what

he told Mr. McCrady.

his testimony in the deposition out at Port Clinton, by way of refreshing his recollection on the matter, and I refer to page 148 of the deposition where the Government had asked the question whether he recalled having made such a report.

The WITNESS. I still admit I made a report, but what I am trying to confine it to is if that was exactly what I reported at that time. I admit there that I did make a report to Mr. McCrady.

By Mr. STEFFEN.

Q. And you have testified that you recall the first two and the fourth paragraphs as being part of the report?

A. So far, those first four paragraphs I remember.

Q. As having been included in a report to Mr. McCrady? A. Yes, I think they were in a written report.

Mr. BROMLEY. I don't think he says that at all, if the Court please. He doesn't say he remembers paragraph 4.

Mr. STEFFEN. I think that was the testimony.

Justice STEPHENS. We understood him to testify that he remembers in a general way making some such report as is described in those paragraphs of the letter, but he doesn't say that he wrote those paragraphs to Mr. McCrady.

If the recollection of the witness can be refreshed in any way, you are entitled to refresh it, even by asking for

a recess to talk to the witness informally, because 920 I am sure counsel's efforts are honest, and I am sure the witness is entirely honest. But we can't have introduced here what really isn't past recollection recorded, and if we can't introduce it in that form, then he has got to do the testifying.

# By Mr. STEFFEN.

Q. Well, I want to ask some questions, then, concerning your interview with Mr. Avery, which I understood you testified as having had. That is, you did have an interview with Mr. Avery, is that correct, at about this time?

A. I couldn't say right now as to a particular date, I

had a number of them.

Q. Did you have one on or about July 2, with Mr. Avery, at which you discussed the license agreements, July 2, 1928, being the date of the letter that I have been showing you, Exhibit No. 143?

A. I do not remember any more than as that letter brings it to my memory. That date is too far past, I couldn't

establish any date.

Q. That is, you don't remember the date, but do you remember that you did have a discussion?

A. I remember that I had a discussion with Mr. Avery,

several of them.

Q. And did you have a discussion with Mr. Avery at any time at which Mr. Avery signified that he would want to grant no more license agreements unless you could get 100 percent—

921 Mr. BROMLEY (interposing). I object to that as leading.

Justice STEPHENS. The matter is critical, and I think the Court is bound to rule that counsel ought not to lead in this aspect of the examination.

## The WITNESS. What is your question?

Justice STEPHENS. Can't you just tell us in your own way, Mr. Griswold, what you talked with Mr. Avery about? You can't remember the words, of course, but just tell us in your own way. You have read this letter, and you say it refreshes your recollection that you made a report, and that you had talks with Mr. Avery. Now just forget you are in a court room and don't be under any pressure or fear at all. Just take your time and tell us in your own way, if you remember, what you talked to Mr. Avery about, and what was said by you, in substance and effect.

The WITNESS. As I remember, I had this interview with Mr. Avery to discuss the license agreement particularly for the reason that this was getting pretty late, during the term of this patent litigation, and it was about the time my merger was either going across or was not going across, that is, going to be successful.

At this time it was considered that it was going to be successful, and I wanted to get from Mr. Avery a promise to continue this until I could get at least my own fellows in on

this license agreement, or get my own company to

922 sign up a license agreement.

As I have already testified, the understanding was that if the new company in this merger took out a license agreement, that covered any of the other companies that I took in on the merger, like Niagara, Empire, Atlantic Gypsum, or whoever manufactured board, that covered any subsidiaries or companies of that kind that we controlled under this merger; and Mr. Avery having withdrawn the proposition for settlement-placed me in a kind of embarrassing position; and the further threat that he made, that he wouldn't consider any more, placed me still in more of an embarrassing position, because I was faced with a possibility that if they couldn't get any license agreement; some of these plants that we were taking over in the merger, spending a good many thousands of dollars in building wallboard plants, would not show any returns from the money, because we wouldn't be allowed to make any closededge wallboard unless we took a risk of suits from the USG, and if we made anything else we were at a disadvantage to market it.

So I was vitally interested in trying to persuade Mr. McCrady to hold off on the thing until I at least got my

Justice STEPHENS (interposing). You said "Mr. McCrady". Did you mean Mr. Avery?

The WITNESS. Mr. Avery.

923 Justice STEPHENS. What did you say to him on that subject of holding off, if anything?

The WITNESS. That was my idea at that time. Of course, this extended over a considerable period, and there were a number of discussions, and it is pretty hard to remember; but this recalls, what else is said here reminds me of what happened at that time, and it is so late, the date, the middle of 1928, that my merger deal at that time, as I remember it now, the audits had all been passed on by the different companies, and the contracts with most of the companies had been signed up to go into the merger; and of course I was vitally interested, because this was going to disturb my arrangements materially unless he held off and took these other companies in. And if he granted us a license, which, as I was informed by my own counsel and others that I consulted, he had a perfect right to do if he saw fit, and we had a perfect right to take out a license if we saw fit, that cleared the way for me to go ahead with the merger and operate these plants, which were scattered around over the country, and gave me a national distribution of wallboard, which I was handicapped on before, because in trying to ship from Port Clinton to the Atlantic Coast I had to pay a terrific high freight rate.

Justice Stephens. I am afraid the Court in attempting to aid the progress of the examination, is getting the witness to tell much more than anyone wants in the record. Won't you tell us what you said to Mr. Avery, if you remember it, on this subject?

The Wirness. Well, as I remember it, I argued with him that it would work a hardship on me unless he would continue to hold forth his offer to license these companies.

Justice STEPHENS. Unless he would do what?

The WITNESS. License these different companies that we proposed to merge, at least.

Mr. BROMLEY. He said "continue to hold forth."

The WITNESS. At this particular time, the Universal Gypsum Company, as I remember, had already signed up a license agreement, and the Atlantic Gypsum Company—I couldn't say if they had, but if they had not signed it, they

were considering signing it at this time; and the National Gypsum Company I think at this time had signed their agreement, and I was anxious that he hold off to take in the rest of these companies.

Justice Jackson. And that is what you told him, is it?

The WITNESS. Which left one company outside-

Justice Jackson (interposing). Is that what you told Avery?

The WITNESS. Yes, as I remember it, and that left only one company outside of that.

Justice Jackson. What did he say, if you remember?

The WITNESS. Well, as I remember, it was that he insisted at that time, or stated that he wanted them all to come in, and of course I had no connection with the Certain-teed Products, and very seldom called on them.

# By Mr. STEFFEN.

Q. Did you testify that National had come in at this

time, or did you mean Universal?

A. I said I didn't know whether they had or not, I wasn't sure whether they had come in. These negotiations extended over such a long period, that it is pretty hard to remember these dates.

Q. What was the status, if you know, of the suit which Mr. Avery's company had brought against your company

at this time—this is on July 2, 1928?

A. Well, I could not say without something to refresh my memory now. It was getting pretty close to the date when we got a decision, if it had not already been rendered.

Q. Do you remember the date when you got the decision?
A. No, I do not remember—I remember the date I heard about it:

Mr. Bromley. We will stipulate it if you would like us to.

The WITNESS. I remember the date I heard it.

# By Mr. STEFFEN.

926 What date is that, that is what I want? A. July 7, 1928.

Q. Do you recall why you remember that?

A. Yes, it interfered with my golf game very seriously. [Laughter.]

Justice STEPHENS. Is that the suit, Mr. Griswold, that you said in one of your letters that you thought you could

win if you could get the judge to understand it? [Laugh-ter.]

By Mr. STEFFEN.

Q. I want to go further into your discussion with Mr. Avery at this time. Did the subject of the prices of products come up in your discussion?

A. Nothing any more than the price on wall board.

Q. Did you discuss the price, perhaps, of plaster and of block? I show you your exhibit.

A. You are talking about reporting to Mr. McGrady!

Q. No, I am asking you if, in this conversation with Mr. Avery, you took up the prices of wall board and block and

plaster.

A. With Mr. Avery, I do not remember, at that time. We tried to keep pretty well posted on the prices that were prevailing over the country on these different commodities, and the information that I was passing on to Mr. McCrady here was probably the information that I had secured from other sources.

Q. But I want to direct your attention particularly to the conversation you had with Mr. Avery. Did the matter of price concerning plaster and the price concerning block—this was in 1928—did that come up in your conversation?

A. No, no; it did not. The discussions of prices on those commodities never were had in connection with this. This was a patented article, wall board, and the other articles were unpatented. We knew we had no right to discuss

other articles, any unpatented articles.

Q. I didn't mean to ask you whether you expected to have a license to fix prices on plaster, but I ask you if the price of plaster was discussed at all with Mr. Avery while you were discussing the board matter. I call your attention to the exhibit.

A. I couldn't say definitely, but it was usually customary that we did exchange information as to what prices existed over the country, there was no secret about it, and if Mr. Avery should ask me what price I was quoting, I had no hesitancy in tell him or any other of my competitors.

Q. Well, were plaster prices stable at this time, in 1928? A. I think not, as I remember it. I think they were be-

ginning to come down pretty low.

Q. Do you recall having discussed whether the board licensing agreement might have an effect on stabilizing prices concerning plaster?

A. With Mr. Avery?

Q. Yes.

A. Well, I do not remember it other than the possibility that he might—of course, we understood, or I understood, that the law would give him the right, under this patent, to tell me what price, or any other licensee, what price he must sell his stuff at—

Q. (Interposing.) That is as to board only?

A. Yes, but what price that was, Mr. Avery did not say at that time, or at any other time, as I remember it.

at that time, or at any other time, as I remember it.

Q. Did you discuss with Mr. Avery whether a stable price for board would have an effect upon plaster or tile

prices?

A. I would say that we probably exchanged views on the possibility of that being the case, because that naturally would follow, that if prices on one of the principal products of a company were at a fairly remunerative basis, and had been changed to that basis, and another article they sold was sold below the cost of manufacture, it was natural to figure that it would influence to a certain extent the lower prices, that a man wouldn't be trying to make all of his money on one product he was selling, and giving the other one away.

Q. I would like now to show you, to refresh your recollection, this paragraph of Government's Exhibit 143.

929 Justice Jackson. Indicating what paragraph?

Mr. Steffen. The second paragraph on the second page.

By Mr. STEFFEN.

Q. I ask you to read that, Mr. Griswold, and see if that refreshes your recollection. Now can you tell us, Mr. Griswold, whether Mr. Avery said, in your discussion with him, anything concerning the effect that stabilization of the board market would have upon the plaster and block markets?

Mr. Bromley. I object to that as leading, and request that the letter be taken from beneath the witness' eyes when he answers.

Justice STEPHENS. Well, we think that the Court has been very liberal in allowing the examination of this witness, realizing the difficulties of the Government in making its case, but I think it is not proper to, in effect, ask the witness to read that paragraph. Sustained.

By Mr. STEFFEN.

Q. I don't believe I have yet an answer to my question,

Mr. Griswold.

Can you now tell us whether or not Mr. Avery discussed with you at this time the effect which the board licensing agreements might have toward stabilizing prices on plaster and block, recognizing that he couldn't fix the prices on plaster and block, and that they could only be fixed legally

on board, as you have testified?

Mr. Bromley. I object to it as repetition. 930

Justice Stephens. He has already answered that question.

The WITNESS. Well, I could not say that we discussed that feature.

By Mr. STEFFEN.

Q. Your testimony a minute ago, though, was that it would have the natural effect to stabilize-

A. (Interposing.) That would be the natural effect—

Mr. Bromley (interposing). I object to that as leading, and move to strike out the answer.

Justice STEPHENS. It may go out.

By Mr. STEFFEN.

Q. Will you say whether, in your opinion, a stabilized board market would have any effect toward stabilizing the prices of plaster or block?

Mr. Bromley. I object to that as calling for a conclusion.

Justice STEPHENS. Well, you are not objecting to that as leading, but only because it asks for an opinion?

Mr. BROMLEY. Well, I am objecting to it as leading and as repetitious.

Justice STEPHENS. It is already in the record. I doubt if it is objectionably conclusional. This witness has practically placed himself in the category of an expert; he has

testified to long experience in the wall board and plaster business, and I think he could testify as to what the effect would be, if he is being offered as an expert-I don't know that he is-but his answer is in the record. It is repetitious; objection sustained.

Mr. Steffen. I would like to offer-I am not clear whether Your Honors have ruled upon this-Exhibit No. 143 in evidence as embodying in substance and effect, as respects paragraphs 1, 2, and 4, the matter contained in a report which Mr. Griswold testifies he made to Mr. McCrady. That testimony, I think, is clear that far.

Mr. Bromley. Objected to as incompetent, because no proper foundation laid.

Justice STEPHENS. The Court has in effect ruled upon that. If you want a formal record on it, so that you may assert it as error in the event of an appeal, should this case ultimately go against you, you are entitled to make it, of course. The objection will be sustained; the exhibit is not received in evidence.

(The document referred to, marked Government's Ex-

hibit 143 for identification, was rejected.)

By Mr. STEFFEN.

Q. I now show you, Mr. Griswold, Government's Exhibit No. 144, which purports to be a letter from you to Mr. Eugene Holland, care of Universal Gypsum and Lime Company, under date of September 10, 1928.

Justice Jackson. What is the "D" number on that?

Mr. KNUFF. It would be D-78.

Justice STEPHENS. What is the date of it?

Mr. KNUFF. September 10, 1928.

The WITNESS. Yes, this is the original letter that I wrote Mr. Holland.

Mr. Steffen. I offer in evidence Government's Exhibit No. 144 as—

Justice Stephens (interposing). A declaration of an alleged co-conspirator?

Mr. STEFFEN. Yes.

Justice Stephens. Received subject to the general restrictions made upon that class of evidence.

(The letter referred to, marked Government's Exhibit-

No. 144, was received in evidence.) .

Mr. STEFFEN. I will read the letter, if I may, to the Court.

Justice STEPHENS. We have all read it, Mr. Steffen, and it is not necessary to read it now. We have conferred upon

the matter of reading items into the record, and we think that that ought not to be done. It is not necessary. It is in effect a way of arguing the case during the trial, by

bringing particular matters of emphasis to the attention of the Court. We will read every letter, as you offer them; and we will consider them very carefully as you argue the case, but I think we ought not to waste this time or clutter up the record with so much

## By Mr. STEFFEN.

Q. I direct your attention to a statement in your letter which reads:

"Under the conditions as they are now, you, and licensees (that apparently refers to the Universal Gypsum Company) should be entitled to some protection which you are not getting, and we of course feel the same way, and I think the rest of the concerns do also."

Could you tell us what you meant by "protection"?

A. That, as I remember it, had reference to the assurance that if the prices on wall board got so low that it was. working a hardship on the licensees, that they should be granted some relief from paying that royalty, and the contract contained no such clause in it, but such assurance had already been expressed verbally, but had not been included in the contract.

Q. You say it had been expressed verbally. When did

that take place?

933

expense.

A. Well, I couldn't state the date—in some of the meetings we had been given an assurance.

Q. By whom?

A. I think it was by Mr. Avery, because he was the only one that we talked to, that should such a condition arise that he—well, while he never specified any amount, he intimated that he would grant some relief.

Q. I now show you Government's Exhibit 145, which purports to be a copy of a letter from Mr. Eugene Holland to the American Gypsum Company in answer to your letter of September 10, and ask if you recall having received the original of that letter.

Mr. KNUFF. There isn't any "D" number on that.

Mr. OLIVER. What is the date of it?

Mr. Steffen? September 13, 1928.

The WITNESS. Yes, I remember receiving a letter from Mr. Holland along about this time, but there is nothing on this to indicate that that was the letter; but it deals with the matters that I had had correspondence with him on, and my judgment would be that this is a copy of the letter.

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 146, which is a photostatic copy of a purported letter from the American Gypsum Company to Mr. Eugene Holland, under date of September 19, 1928, and which replies to the letter of the 13th, and ask you to read that and say whether or not that is a photostatic copy of a letter which you sent to Mr. Holland.

A. I would say that that is a photostatic copy of a letter that Mr. Holland wrote me under date of

September 19.

Justice STEPHENS. Is he talking about Exhibit 146?

Justice Jackson. He just got it turned around; Holland didn't write that letter.

By Mr. STEFFEN.

Q. You say that this was a letter you wrote to Holland, or that Mr. Holland wrote to you?

A. This is a letter that I wrote to Mr. Holland.

Justice STEPHENS. Which one is that?

Mr. STEFFEN. That is Government's Exhibit 146, and

it is the letter of September 19, 1928.

I will now offer Government's Exhibits Nos. 145 and 146. I might state that these three exhibits, Government's Exhibits 144, 145, and 146, are all exhibits which I believe were taken from the files of the National Gypsum Company. We have shown Mr. Finck Government's Exhibits No. 145, and he states that that was taken from the files of the National Gypsum Company.

Mr. FINCK. No, from the files of the Universal Gypsum and Lime Company, after we had taken over the Universal Company.

Mr. OLIVER. May I see Exhibit 145?

Mr. STEFFEN. Yes.

(Exhibit 145 for identification was handed to Mr. Oliver.)

Justice STEPHENS. What is Exhibit 144, Mr. Steffen?

936 Mr. STEFFEN. I can show you Exhibit 144.

Justice STEPHENS. Just tell me what it is.

Mr. STEFFEN. It is a letter of American addressed to Eugene Holland under date of September 10, 1928.

Justice STEPHENS. Have you anything to say, Mr. Oliver?

Mr. OLIVER. I object to Exhibit 145 as not properly identified.

Justice STEPHENS. Exhibits 144, 145, and 146, we think, are properly admissible, and so rule.

(Received subject to usual reservation. See Tr. p. 2729.)

(Letter of September 13, 1928, Holland to American Gypsum Company, marked Government's Exhibit No. 145, was received in evidence.)

(Letter of September 19, 1928, American Gypsum Company to Holland, marked Government's Exhibit No. 146, was received in evidence.)

## By Mr. STEFFEN.

Q. I show you Government's Exhibit 147, Mr. Griswold, which purports to be a reply by Mr. Eugene Holland, addressed to you, under date of September 20, 1928. It is in reply to your letter, apparently, of September 19. I ask if you recall having received a letter to that effect.

A. I cannot identify this as having been received from Mr. Holland. However, I did receive information from Mr. Holland along the lines contained in this letter, but I couldn't say that this is an exact copy, because there is nothing on this to identify it that I had

Q. No, that is a copy of a letter. The letter that you would have received would have been the original, and we

do not have that here.

A. Well, I do not remember that, but I do remember the subject-matter of the letter, as having been in a letter from Mr. Holland.

Q. To the effect of the copy that I show you?

A. Yes.

seen it.

Q. Which is Government's Exhibit 147.

A. Yes.

Mr. STEFFEN. We offer Government's Exhibit 147.

Justice STEPHENS. Mr. Holland was president of what company?

Mr. STEFFEN. Universal.

Justice STEPHENS. Which was in the background of National?

Mr. FINCK. Yes, he was the receiver of Universal Gypsum and Lime.

Justice Stephens. Was this letter taken from the files of Universal?

Mr. FINCK. I haven't seen it yet.

Mr. STEFFEN. We will say that it was taken from their files, but if you would like to have Mr. Finck see it, that is all right.

May we ask for a recess while Mr. Oliver is examining

this?

939

Justice STEPHENS. Yes, we will have a five-minute recess.

(At this point a short recess was taken, following which the proceedings were resumed.)

Mr. STEFFEN. I now offer Government's Exhibit 147 which the witness has identified generally as being a copy of a letter which he received, and Mr. Finck has stipulated that this copy was taken from the files of Universal Gypsum Company, which are now in the possession of National Gypsum Company.

Justice STEPHENS. It may be received subject to the usual restrictions on this class of testimony.

(The letter referred to, marked Government's Exhibit No. 147, was received in evidence.)

By Mr. STEFFEN.

Q. We now go back to some correspondence purporting to be had with the Texas Cement Plaster Company, and I show you, Mr. Griswold, Government's Exhibit 148 for identification, which is D-44, and purports to be a letter of yours to Mr. Gloyd under date of January 25, 1927, and ask if you can identify that as a copy of a letter which you sent to Mr. Gloyd.

A. There is nothing on this to indicate that I re-

ceived it, and it is not-

Justice Jackson (interposing). That you wrote it, you mean?

The WITNESS. That I wrote it—and it is not on our stationery. My initials are on it, but they were put on by my stenographer. In a general way I remember writing Mr. Gloyd, but I do not remember this particular letter.

By Mr. STEFFEN.

Q. Now I show you Government's Exhibit No. 149, which purports to be a reply from Mr. Gloyd, addressed to you

under date of February 17, 1927, in answer to a letter of yours dated February 10.

Justice Stephens. Is that D-45?

Mr. Steffen. Yes.

The WITNESS. Yes, I remember this letter.

Mr. STEFFEN. May I correct my statement? That does not purport to be a reply to the letter. Government's Exhibit 148.

By Mr. STEFFEN.

Q. Do you remember having received that letter?

A. I remember having received that letter.

Q. How do you know that?

A. This is my writing up here. Q. Do you know Mr. Gloyd's signature? A. 'Yes, I know Mr. Gloyd.

Q. Do you know his signature? 940 A. That is very indistinct. Usually I do, but I wouldn't say that that was his signature because it is so dim, but ordinarily I would recognize his signature if you have it on any other paper.

Mr. JOHNSTON. May I see Exhibit 149? (The exhibit was handed to Mr. Johnston.)

Mr. Johnston. I will say to the Court that as to these Gloyd letters I have no idea what they are, because I have not seen them.

Justice Stephens. Take your time and examine them.

Mr. KNUFF. There is a copy right next to Mr. Johnston, they have copies that have been furnished to Mr. Oliver.

Mr. JOHNSTON. Now, if the Court please, it takes a long stretch of the imagination to say that photostatic copies that Mr. Oliver came to the Department and got, and is using here, that I have had access to.

Justice STEPHENS. Well, if you haven't had actual access to them, take your time now and examine these letters.

Mr. KNUFF. I didn't mean to imply that Mr. Johnston had access to them. I meant that he already had, right next door to where he is sitting, copies of these, without taking them from the witness.

Justice STEPHENS. That is quite all right, Mr. Knuff. We We understand that you didn't mean any improper implications.

941 Mr. JOHNSTON. Now may I see Exhibit 148? (The exhibit was handed to Mr. Johnston.)

Mr. Steffen. Has Mr. Johnston finished his examination?

Mr. JOHNSTON. Yes, I have seen them.

Justice STEPHENS. Have you seen the letters, Mr. Johnston?

Mr. Johnston. Yes. I didn't understand that he had offered them yet.

Justice STEPHENS. Not yet.

# By Mr. STEFFEN.

Q. I want to show you again Government's Exhibit No. 149, which purports to be a letter from Mr. Gloyd to Mr. Griswold, and ask if that writing at the top there is identified as being your writing.

A. Yes, I would say that that was my writing.

Q. I now show you a photostatic copy, another photostatic copy, of what I think you will regard as the same exhibit, and ask you if that shows Mr. Gloyd's signature a little more clearly than on the exhibit I showed you first.

A. Yes, this signature is very clear and I would say that

that was Mr. Gloyd's signature.

Justice STEPHENS. Is there a magnifying glass available here?

(A magnifying glass was handed to Justice Stephens.)

Justice STEPHENS. Maybe the witness can tell if he uses that, about the signature on Exhibit 149.

942 (The magnifying glass was handed to the witness.)

By Mr. STEFFEN.

Q. You might see if that will show the signature on Exhibit 149 to any better advantage.

A. It does; I would say that that was Mr. Gloyd's signa-

ture.

Mr. STEFFEN. I now offer Government's Exhibit 149 in evidence.

Justice STEPHENS. Is there any objection?

Mr. JOHNSTON. The usual objection.

Justice STEPHENS. It may be received, subject to the usual reservation with respect to this class of evidence.

(The document referred to, marked Government's Exhibit No. 149, was received in evidence.)

Mr. Steffen. I now offer Government's Exhibit No. 148, which is a copy of the letter of the American Gypsum Company to Mr. S. M. Gloyd.

Mr. OLIVER. I object to that exhibit, Your Honor, for the reason that it is not properly identified. Specifically, the witness testified that he does not remember this particular letter, but remembers writing letters to Mr. Gloyd. I don't think that is sufficient identification.

Justice Stephens. In view of the fact that the witness stated that he cannot identify it and there is no circumstantial identification on it, and no other letter has been introduced which seems to be a response to it, we are of the view that that letter cannot come in evidence as presently identified.

The letter referred to, marked Government's Exhibit

148 for identification, was rejected.)

By Mr. STEFFEN.

Q. I now show you, Mr. Griswold, Government's Exhibit No. 150, which is D-46, which purports to be a copy of a letter from the American Gypsum Company to the Texas Cement Plaster Company under date of February 21, 1927, in reply to Mr. Gloyd's letter of the 17th, and ask if you can identify that as a copy of a letter, not the original, which you may have sent to Mr. Gloyd. Do you remember having written that? Do you remember whether or not you wrote to Mr. Gloyd in reply to his letter of the 17th?

A. The reply is dated February 21. I remember writing Mr. Gloyd, but this is plain paper, and there is nothing here that I can say indicates that this is an exact copy. Those are my initials, but those were put on by the stenographer.

There is no signature here.

Q. Will you tell us whether you wrote a letter to Mr. Gloyd, embodying the substance and effect of that letter which you have in your hands?

A. I would say yes.

944 Mr. STEFFEN. I will now offer Government's Exhibit No. 150 in evidence, with the observation that this copy was taken from the files of the American Gypsum Company.

Justice Stephens. It may be received, it is circumstantially identified, subject to the reservation with respect to declarations already made.

(The document referred to, marked Government's Exhibit No. 150, was received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 151, which purports to be a letter from Mr. Gloyd to Mr. Griswold, under date of March 10, 1927, and ask if you can identify it as a letter which you received from Mr. Gloyd. That is D-47.

Justice STEPHENS. Who is the Mr. Johnson referred to in these letters? Will you bring that out?

Mr. STEFFEN. We will bring that out,

The WITNESS. Yes, I received this letter. This is my writing here in the corner.

By Mr. STEFFEN.

Q. Do you recognize the signature?

A. Yes, sir.

Mr. STEFFEN. I offer Government's Exhibit No. 151 in evidence.

Justice Stephens. Received in evidence subject to the reservation already made with respect to this class of declarations.

(The document referred to, marked Government Exhibit

No. 151, was received in evidence.)

By Justice STEPHENS.

Q. Will you tell the Court who was the Mr. Johnson re-

ferred to in Mr. Gloyd's letter of March 10?

A. Mr. Johnson was a gentleman in Chicago who was in the insurance business, I forget the name of his company, he had been with them a long time in Chicago. He also was in the business of the manufacture of varnishes. In some manner has was associated also with True and Webber, private bankers, in Chicago, and he became interested—

Justice STEPHENS (interposing). You have perhaps answered it as far as the Court needs to know, unless counsel wishes you to go further.

Mr. STEFFEN. I would like to have him answer in full.

The WITNESS. He became interested in this merger proposition, in trying to put this merger across, and it is referred to in this letter that Mr. Gloyd just received a letter from him. That is the connection. Mr. Johnson was trying to promote the merger and put it through.

#### By Mr. STEFFEN.

Q. Was that Martin Johnson?

Q. And who were True and Webber?

A. They were private bankers in Chicago. Q. And what did they have to do with the merger, if anything?

A. Well, they were the company that was going to finance

the proposition originally.

Q. What was Martin Johnson's part in the matter, if

he had any?

A. Well, he had done a good deal of work in getting these companies to agree to the merger, the Empire Gypsum Company and the Niagara Gypsum Company and the Texas Cement Plaster Company—we tried to get Ebsary Gypsum Company, but he was too hard to handle, Ebsary was.

Q. Would you call Mr. Johnson a promoter?

A. Well, yes, I would say he was, in addition to his other qualifications.

Q. Was there a check put up by either Martin Johnson or True and Webber in connection with this merger?

A. Yes. sir.

Q. What was that? A. \$50,000, certified.

Q. Whose check was that?

A. It was written by Elmer Webber, he signed it, of the firm of True and Webber. 947

Q. Was that delivered to your company?

A. Well, by way of explanation, we had been approached before on selling out the American Gypsum Company, and the thing fell through, after spending quite a little time and taking my time, and I got pretty much disgusted with it, and when this matter came up, I refused to have anything to do with it at all unless I had some evidence of good faith, that the fellows were going to go through with it without all of this talk. So I insisted on a certified check for \$50,000 being put up as evidence of good faith that they would go through with the proposition, and put it through as they had agreed to.

Q. Did they put it through?

A. They did not.

Q. What became of the check?

A. I put it through. (Laughter.) Incidentally, I de-

clared a dividend of 20 percent. (Laughter.)

Q. I now show you Government's Exhibit No. 152/being D-48, which purports to be a letter from the American Gypsum Company to Mr. Gloyd under date of March 14,

1927, in reply to the letter of March 10, which you have just identified, and I ask if that is a copy of your letter.

A. Yes, I would say that that was a copy of my letter, although it is not on a letterheal, but I would say it was a copy, because I remember writing Mr. Gloyd, because I was doing a little promoting work myself.

Mr. STEFFEN. I now offer Government's Exhibit No. 152 in evidence, with the observation that this copy likewise was taken from the files of the American Gypsum Company.

Justice STEPHENS. Have you seen it, Mr. Johnston?

Mr. Johnston. I am just now looking at it. He says that he recognizes it as a copy of his letter.

Justice Stephens. It may be received, subject to the reservation already made with respect to this class of evidence.

(The document referred to, marked Government's Exhibit No. 152, was received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 153, which is D-49, which purports to be a letter from Mr. Gloyd to Mr. Griswold, under date of March 25, 1927, and ask if you can identify that as a letter which you received from Mr. Gloyd.

A. Yes, I would say that that was an original letter from

Mr. Gloyd. I recognize his signature.

Q. I now show you Government's Exhibit No. 154, which is D-50, and which purports to be a letter from Mr. Gloyd to Mr. F. J. Griswold, under date of March 28, 1927, and ask if you can identify that.

A. Yes, I would say that that was an original

949 letter; I recognize Mr. Gloyd's signature.

Mr. Steffen. I now offer Government's Exhibits 153 and 154.

Mr. Johnston. What are the "D" numbers?

Mr. Steffen. They are D-49 and D-50.

Justice Stephens. Have you seen those, Mr. Johnston? Mr. Johnston. No.

Mr. STEFFEN. I have the originals here.
(The exhibits were handed to Mr. Johnston.)

Justice Stephens. These last two exhibits referred to are received in evidence subject to the reservation already

made with respect to this class of declarations.

(The documents referred to, marked Government's Exhibits Nos. 153 and 154, respectively, were received in

evidence.)

## By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 155, being D-51, which purports to be a letter from you to the Texas Cement Plaster Company under date of March 31, 1927. It is just a copy, a purported copy, of a letter, and I ask if you can identify it, from the subject-matter or otherwise, as being a copy of a letter which you sent to Mr. Gloyd.

Mr. JOHNSTON. What was the date of that?

Justice Stephens. March 31, 1927.

950 The WITNESS. There is nothing on this to identofy it that I actually wrote it, but I remember distinctly writing Mr. Gloyd along the lines contained in the letter, and my initials are there, but they are put on by the stenographer.

Mr. STEFFEN. Would you like to look at this, Mr. Johnston?

Mr. JOHNSTON. Yes.

(The exhibit was handed to Mr. Johnston.)

Mr. Johnston. We have no record of such a letter, and I object to it for lack of proper identification.

Justice Stephens. The Court thinks that letter is circumstantially identified by its subject-matter and the name of the American Gypsum Company, and the initials which have appeared on all of these letters, "FJG/AS"; and by the contents, their response to previous letters. It may be received in evidence subject to the reservation already made with respect to this class of declaration.

(The document referred to, marked Government's Ex-

hibit No. 155, was received in evidence.)

951 By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 156, D-52, which purports to be a letter from Mr. Gloyd to you under date of April 5, 1927, and purports to reply to your letter of the 31st, and ask if you can identify that as a letter which you received from Mr/Gloyd? A. Yes, I remember seeing this letter; those are my initials. I also remember that M. Gloyd elected to make his application to the U.S. Gypsum Company direct, and I knew nothing about it until after it was made.

Q. Can you identify Mr. Gloyd's signature? A. That is Mr. Gloyd's signature, I would say,

Mr. Steffen. I now offer Government's Exhibit No. 156 in evidence.

Justice STEPHENS. Have you seen it, Mr. Johnston?

Mr. JOHNSTON. I have a copy.

Justice STEPHENS. It may be received in evidence subject to the reservation already made with respect to this class of declaration.

(The letter referred to, marked as Government's Exhibit

No. 156 was received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 157, being D-53, which purports to be a copy of a letter which you wrote to Mr. Gloyd under date of April 9, 1927, in reply to his letter of the fifth, and ask if that is a copy of a letter, the original of which you sent to Mr. Gloyd; if you can identify it either from the substance or

otherwise, you may do so.

A. There is nothing on it to indicate that this is a copy of the original, with the exception of the notat in of the stenographer who has placed my initials on there, but I remember writing Mr. Gloyd after receiving his advice that he had made application for a license.

Q. Can you say whether your letter embodied the substance and effect of the copy that you hold in your hand?

A. I would say that it did, yes.

Mr. JOHNSON. May I see the letter?
(The letter was handed to Mr. Johnston).

Mr. Johnston. We, at least for the record, object because of lack of proper identification, and call the Court's attention to the apparent subsequent typing—

Justice STEPHENS (interposing). Apparent what?

Mr. JOHNSTON Apparent subsequent typing at the bottom of the first page. It isn't margined evenly with the other, and it was set in by somebody after it was written. I think that is wholly incompetent.

Justice Stephens. Well, we think it is circumstantially identified. It has reference to the letter to which it 953 it is an apparent response. Mr. Griswold testified that he remembers writing the substance and effect of this to Mr. Gloyd. I think your objection to the material which you describe as added, goes to its weight, and it may have been a short carbon. Of course, you may attack it in your defense or on cross examination. If you claim this is added, that would be a serious matter, and you have a right to attempt to show that. But in the present state of the record I believe the exhibit is admissible and it is received.

(The letter referred to, marked as Government's Exhibit

157, was received in evidence.)

Mr. Adams. May I add to the usual grounds of objection here, that with particular attention to the third paragraph of the letter, which begins, "It may be very interesting for you to know that Certain-teed Products Company has expressed indirectly a willingness to enter into a license agreement", that that is a kind of double hearsay, and it doesn't seem to me that even on the theory of declarations of a co-conspirator, it could possibly be admissible. I thought I should call that to Your Honors' attention.

Justice Stephens. I think that objection will be overruled; I think it goes to its weight. The exhibit is received subject to the usual reservation with respect to this class of declaration.

954 Mr. STEFFEN. Your Honor, Mr. Johnston raised a question concerning the typing. This is a letter, the original of which should be in the possession of the Gloyd company, the Texas Cement Plaster Company, and we would make the request that Mr. Johnston produce the original, if he has it?

Mr. Johnston. Yes, I want to do that for my own inspection, I am going to do it and compare it and see if there has been any change. Counsel called my attention to something. I am not sure that we have it because in the criminal case we furnished our records to the Department, and I am not sure whether copies were sent back, or the originals, I just don't know, but I will look it up and see.

Justice Stephens. I call your attention, Mr. Johnston, to the fact that the portion which you describe as "added" is connected in context and wording. The lines in the paragraph which would not be described as "added" are: "Mr. Avery seems to be very appreciative of the work his friends

have done and will say that they do away with all troublesome and dis-" and then there is a hyphen and a drop, followed by "taseful litigation". So circumstantially it would seem to indicate that it was not added, but just dropped down as far as the sheet of paper is concerned.

By Mr. STEFFEN.

Q. I now show you, Mr. Griswold, Government's Exhibit No. 158 for Identification, D-54, which purports to be a letter from Mr. Gloyd, addressed to you, under date of April 11, 1927, and ask you if you can identify it as a letter which you received from Mr. Gloyd?

A. Yes, I would say that is Mr. Gloyd's signature.

Q. Is this writing at the top anything you can identify?

A. That is my writing, showing that I received it.

Mr. STEFFEN. I now offer in evidence Government's Exhibit No. 158, as a declaration of a co-conspirator.

Justice STEPHENS. Have you seen that, Mr. Johnston?

Mr. Johnston. Yes.

Justice STEPHENS. It may be received, subject to the usual reservation with respect to this class of declaration. (The letter referred to, marked as Government's Exhibit 158, was received in evidence.)

#### By Mr. STEFFEN.

Q. I now show you, Mr. Griswold, Government's Exhibit No. 159, which purports to be a reply on your part to Mr. Gloyd, under date of April 13, 1927, a reply to the letter of the 11th, and I ask you to examine the contents and tell whether or not you sent Mr. Gloyd an original letter, of which this is a copy?

A. There is nothing on here to indicate that it is an original—it is really a copy—but I mean there is nothing

on here to indicate that it is the same as the original.

My initials and the stenographer's are copied in the corner, the same as on the others.

Q. Can you tell from the contents whether that was a reply—

A. (Interposing.) From the contents I would say that it was a reply to the former letter from Mr. Gloyd.

Justice STEPHENS. Do you offer that?

Mr. Steffen. I offer that in evidence.

Justice STEPHENS. It is received, being circumstantially identified by its contents and reference to the previous

letter, subject to the usual reservation as to this class of declaration.

(The letter referred to, marked as Government's Exhibit 159, was received in evidence.)

Mr. Steffen. Your Honor, that brings to a close one phase of this testimony, and if it is the Court's pleasure we would ask to adjourn at this time.

Justice STEPHENS. We will make definite now, gentlemen, so that you can make your hotel reservations and Pullman reservations and so on, the plans of the Court. I have already stated this morning that we will have to adjourn on Friday, the third of December, and we will resume sitting on Monday, the 13th, and we will sit until the

21st or 22nd, depending upon the convenience of counsel as then announced with respect to getting back to their respective homes. Of course, if we can sit to the 23rd we will be glad to do so. But when we approach that, you can let us know which date you would like to have an adjournment on, as far as your general, mutual

convenience is concerned.

Now we will not ask counsel to return here during the Christmas week, the week between Christmas and New Years. That would only accomplish two or three days and make a very long trip for Mr. Johnston and for the lawyers from Chicago, and we will have to adjourn, therefore, just before Christmas, on the 21st, 22nd or 23rd, until the 17th

day of January, 1944.

That time will not be lost so far as the judges are concerned because there is a great mass of material which we can't hope to keep up on, sitting in court so many hours, and with questions of law to look up from time to time in the evenings. We will use that time in going over these exhibits and going over the transcript, and that will not be lost as far as we are concerned, and perhaps not as far as counsel are concerned, and their future preparation.

Mr. Johnston. If the Court please, because of the travel conditions, it is almost impossible even at this date to get accommodations for the holiday season, and if the Court could now fix the definite date of adjournment, then we would know—

Justice STEPHENS (interposing). The date of adjournment before Christmas?

Mr. JOHNSTON. That is right.

Justice STEPHENS. We would like to set it as close to

Christmas as possible. Could you get back if we fixed the adjournment for the 22nd?

Mr. JOHNSTON. Well, I can get back if I can get transportation. What I mean is that I would like to know now the date of adjournment so I would know the definite date to ask for my transportation.

Justice Jackson. How long does it take you to get back there?

Mr. JOHNSTON. Two days.

Justice Stephens. We will adjourn the evening of the 22nd of December.

Justice Jackson. Any counsel for the defendants who desire to use this set of exhibits here is welcome to use it over the week-end.

Justice Garrett. I have a set here also, to which counsel are welcome.

Mr. JOHNSTON. I wonder if I might borrow it?

Justice GARRETT. Certainly.

Justice STEPHENS. Here is another one that can be used. One announcement further, and that is that when we adjourn next Wednesday for Thanksgiving recess, we will

have to adjourn at about 3:15, as I have a meeting.

959 of the Patent Interchange Committee, of which I am President. That might be convenient for you to

know, if you are catching trains.

One other thing before I forget it? Mr. Griswold, if you would like, during the noon hours, to have a place to rest, the Marshal can take you into the Robing Room where there is a couch. We want to make it as convenient and comfortable for you as possible.

The WITNESS. Thank you very much.

Justice Stephens. Announce a recess until Monday

morning at 10 o'clock.

(Whereupon, at 4:00 o'clock, p.m., the trial was recessed until Monday morning, November 22, 1943, at 10:00 o'clock).

960 In the District Court of the United States For the District of Columbia

#### Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

2.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS

SEVENTH FLOOR, INTERNAL REVENUE BUILDING, Washington, D. C., Monday, November 22, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances; (Same as heretofore noted.)

Page 1065, opposite line 12, it states: "(There followed an informal conference between counsel and the Court at the bench, not recorded.)"

The conference should have been recorded. It was not the intention of the Court to omit anything from the record, but only to inform counsel informally concerning the Court's views with respect to the rules of evidence. What the Court said at the time was, in substance and effect, that exhibits being used in the manner in which exhibits referred to at that time were being used, could be used either to re-

fresh a present recollection, in which event the exhibit itself was not in evidence except to show to the Court how the recollection was being refreshed; or

as past recollection recorded, in which event the witness would be obliged to swear to his confidence in the correctness of the memorandum.

Unless there are other preliminary matters, the case may

proceed.

Thereupon, FRANK J. GRISWOLD, the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

#### DIRECT EXAMINATION RESUMED

#### By Mr. STEFFEN.

Q. I have some questions this morning, Mr. Griswold, concerning the suit which the United States Gypsum Company brought against you, and which was still pending as late-as May, 1927. Do you recall whether or not that suit was dropped from the calendar at any particular time?

A. You mean the suit for damages?

Q. That is right.

A. There was one that was dropped, I don't know whether it was the suit for damages or not. I think it must have been the suit for damages, in the Court at Cleveland. I believe it was postponed or dropped.

Q. Do you remember about when that was?

A. No. I don't. It was prior to 1928.

Q. How do you know it was prior to 1928? A. What is that?

Q. How do you know it was prior to 1928?

A. Because the final decision, the final trial, came in 1928.

Q. I show you Government's Exhibit No. 160, which is D-38, which purports to be a letter from you to Mr. Avery under date of May 31, 1927, and ask if you can identify that as your letter?

A. Yes, this is a letter written by me to Mr. Avery on

that date.

Q. Does that refresh your recollection as to the time when this suit was dropped from the calendar in Cleveland?

A. Yes, it does.

Q. Did you have anything personally to do with that matter, did you go to Cleveland on the occasion when it was dropped from the calendar?

A. I don't remember of making any special trip for that.

Q. Can you tell us now about the date when it was dropped from the calendar?

A. Well, it was about May 31, 1927.

Q. Was this matter ever called to the attention of the Board of Directors of American Gypsum Company, this matter of dropping the litigation from the calendar?

A. Well, I can not remember that without something to refresh my memory—

Q. (Interposing.) What is your best recollection now?
A. I would say yes, that they were familiar with what was going on.

Justice Stephens. Is this letter in the record of photostats, Mr. Knuff? I don't find it here.

Mr. KNUFF. Yes, it is D-38.

Justice STEPHENS. I don't find that here.

Justice Jackson. I don't seem to have it here.

Justice Stephens. If so, it is out of order, it is not in here after D-37.

Mr. Steffen. It follows the exhibits that we introduced at the end of the session, concerning Gloyd and the Texas company.

Justice Stephens. Well, we can look at the original after counsel has finished examining on it.

Mr. KNUFF. It should follow D-55 in your book, Your Honor, which was a letter to Mr. Gloyd.

Justice Jackson. Yes, we have it.

Justice STEPHENS. Just let the Court read it. Very well, proceed.

By Mr. STEFFEN.

Q. I now show you Government's Exhibit 160-A, which is D-106 in the folder and comes about 4 or 5 documents on, which purports to be the minutes of a meeting of the Board of Directors of American Gypsum Company under date of June 22, 1927, and I will ask you if you can identify the signatures at the foot of the document?

A. Yes.

Justice Stephens. Has that been given an identification mark?

Mr. STEFFEN. 160-A.

Justice Stephens. And the previous one is 160?

Mr. STEFFEN. Yes, 160.

By Mr. STEFFEN. -

Q. Are you able to identify the signatures?

A. Yes. Q. What are they?

A. J. H. McCrady, President; J. B. Davis, Secretary.

Q. Do you recall whether you were present at the meeting or not? Or what is your recollection?

A. My recollection is yes, and the record so indicates.

Q. Do you recall any discussion in the Board of Directors meeting at the time the stipulation was presented to them? A. No, I can not recall any at this particular time, not

any discussions.

Q. Well, it says here that Mr. J. H. McCrady was present. Can you recall anything that Mr. J. H. McGrady said in regard to the suit and the stipulation to drop the suit from the calendar?

A. No, I can not remember, at this time, anything par-

ticularly that he said.

Q. Can you remember anything that Mr. C. F. Miller, or Mr. J. B. Davis, said at this meeting concerning the license agreement or concerning the dropping of the suit from the calendar?

A. No, I can not.

Q. Was there any discussion when it was presented to the

Board of Directors, that you recall?

A. I do not remember of any particular discussion. It is quite evident that some report had been made on the status of the license.

Q. Did you make a report?

A. I have no recollection other than the possibility of the postponement, if it hadn't occurred at that time, being discussed.

Q. Will you look at the stipulation at the end, and that

may refresh your recollection.

Now I want to know, did you make any sort of a statement or report to the Board of Directors at the time that stipulation was presented before the Board of Directors and subsequently entered in the minutes?

A. I don't remember a thing any more than this 968 is a notice that we had received in the mails, or otherwise, because the wording here is copied from

some legal notice we had received.

Q. What does it say?

A. It says:

"It is hereby stipulated by and between the parties in the above entitled cause with the consent of this Honorable Court that this cause be dropped from the Trial Calendar under Equity Rule 57 subject to reinstatement by either party within one year from the date hereof."

Q. Was there any discussion of that stipulation at this

meeting, that you recall?

A. I do not remember of any, at this time.

Mr. JOHNSTON. If the Court please, may I inquire, have all copies of those exhibits been returned to the Court?

Justice GARRETT. I do not have mine.

Mr. JOHNSTON. I took Judge Stephens', and returned it. And there was another copy handed to somebody.

Justice Jackson. Mr. Finck retuned mine to me.

Mr. ADAMS. It may be that Mr. Oliver took Judge Garrett's with him.

Mr. Johnston. I wouldn't think so, because he had a photostatic copy.

Mr. ADAMS. Yes, that is true, he did.

Mr. Johnston. I might suggest that counsel look around.

969 Justice Garrett. I don't know what counsel received mine, I gave it to someone.

Mr. JOHNSTON. I do remember that two copies were handed out, and I borrowed one.

Justice STEPHENS. Are you lacking one for use this morning?

Mr. JOHNSTON. I don't need it, but I see Judge Garrett doesn't have one.

Justice Garrett. On page 1256 of the transcript I made the statement:

"I have a set here also, to which counsel are welcome."

"Mr. JOHNSTON. I wonder if I might borrow it?

"Justice GARRETT. Certainly." but I don't know who did get it.

Mr. Johnston. It happened that I got Judge Stephens' copy, and I just now returned it.

Justice Stephens. Judge Garrett can use mine, and Judge Jackson and I can look at one together.

#### By Mr. STEFFEN.

Q. My question, Mr. Griswold, is whether or not you recall that there was any discussion at this meeting? I don't ask you to tell us what the discussion was. I ask you merely to tell us whether or not there was a discussion at this meeting concerning the matter of dropping this suit from the trial calendar?

970 A. Mr. Steffen, I don't remember any particular discussion.

Q. Was there a discussion, that is all I am asking you?

A. I could not say, I don't remember. But this notice had evidently been received of the postponement of this suit.

Q. That is right, and it is put in the minutes.

A. It was probably filed and read, and was acted on, or the Board were notified and a copy of the notice was copied here in the minutes by Mr. Davis, who was the Secretary. He did all that work.

Q. That is right, but that was a rather important matter if that case was dropped from the trial calendar, and I ask you, was there or was there not any discussion concerning

it?

A. Well, I don't remember of any particular discussionabout it.

Q. Did anybody ask why it was being dropped from the

calendar, to your recollection?

A. Well, I would say that the probability was that the Board—

Q. (Interposing.) I want you to say what your recollec-

tion is.

\* A. That I might have made a report on the fact of this attempt to adjust our differences with Mr. Avery, but I can't remember these dates, gentlemen, you have got

71 it too far back; but there was this attempt of mine

to get a settlement of our troubles, for amages for infringing on this so-called Birdsey patent, and whether we had reached an agreement at that time or not, the correspondence should show that. But if we had, I evidently reported to the Board of Directors the results of that

meeting.

Q. Well, I now show you Government's Exhibit No. 161, which is D-40, and which purports to be a letter addressed to you, Mr. Griswold, in reply to your letter of the 31st, which is Government's Exhibit 160 addressed to Mr. Avery, and I will ask you if you recall having received a letter from Mr. Avery such as this letter that I show you, Government's Exhibit No. 161? This is a copy of the letter, and I ask you if you received such a letter? You probably didn't receive that copy, but I want to know if you saw the original?

Justice Stephens. This one isn't very clear.

Mr. KNUFF. Unfortunately, Your Honor, the photostat was from onion skin paper, and we will pass the original to you.

By Mr. STEFFEN.

Q. Please read that carefully.

My question is, do you remember having received an original letter signed by Mr. Avery, of which that is a A. Yes.

Q. I will pass this to the Court, and you may look at a copy, if you will, please.

Now, Mr. Griswold, having read Government's Exhibit No. 161, which is Mr. Avery's letter to you of June 2, can you say whether the settlement talked of in that letter was presented to the Board of Directors at

their meeting on the 22nd?

A. I would say no, for this reason. The Board of Directors of the American Gypsum Company were not interested in this merger that I was proposing to make, that was a matter of my own. It was to be a new American Gypsum Company organized, and the old Board would probably not. be interested in this accept to the extent that if the merger failed and they went ahead, they would know of the proposed settlement.

Q. Now let's go to the letter of June 2, 1927, in which it says that you have had a conference with Mr. Avery. I would like to have you tell the Court now, in your own words, exactly what took place at your conference with Mr. Avery, spoken of in this letter? That is in Mr. Avery's

letter of June 2.

A. This copy is so dim I can hardly read it.

Q. I will give you the original copy, but I want your recollection, not what appears in the copy.

A. I want to read this letter first.

Now state your question again, Mr. Steffen.

Q. I want you to state to the Court, in your own words, of your present recollection, just what took place in your conversation with Mr. Avery. Take your time and

973 tell the whole story.

A. Well, I had caused to be made a check of our records showing the amount of wallboard that we had made since we began manufacturing under this so-called Clark, or afterwards called Birdsey patent, to see just the amount we had made and shipped. And I reported that to Mr. Avery at this meeting, and told him that those were the figures that I had arrived at, and that he was perfectly free to send his own auditors, if he cared to, and check over our books to see whether the figures were correct.

Mr. Avery took the figures, as I remember it, and looked them over, and after doing some mental calculations or figuring he arrived at a figure, as I remember it, something slightly in excess of \$50,000, we figured on a royalty basis.

And finally he said that he would call it \$50,000 even money. and was willing to accept that as a settlement for the damages for using the so-called Birdsey patent up to that time, or the time of the settlement, as I think it developed afterwards, to the time of the Universal's license, I think that time was put in one of the letters.

Q. That time, I might say, was in September, 1926.

A. But whatever it was, at the time of this conference that was to be the amount of damages for past infringement, as he claimed; and from that time on, we were to

pay a royalty of, as I remember it—it was based on a percentage, 5 percent, which, as wallboard was selling at that time at \$30 a thousand, would be \$1.50 per thousand square feet. And that was the basis, as I re-

member it, on which this \$50,000 was arrived at.

In other words, Mr. Avery charged us, according to my recollection, for the past infringement up to that time, at the same rate that he proposed to charge us for any future royalties for wallboard made under the patent.

Mr. JOHNSTON. If the Court please, I assume that we have our centinuing objection to all of this testimony, it not being between Mr. Griswold and Texas or any of these other defendants outside of USG. If not, I would like to interpose an objection and move that what he has said regarding that proposed settlement be stricken.

Justice STEPHENS. Your objection may be noted. The Court is receiving all declarations of one co-conspirator as against others subject to ultimate prima facie proof of a conspiracy. The objection is overruled at the present time except for that restriction.

#### By Mr. STEFFEN.

Q. Now, Mr. Griswold, directing your attention again at this conference with Mr. Avery, what else was discussed at the time, if anything? Did you discuss the royalty provisions of the license agreement? Did you discuss the license agreement?

A. I'do not remember of doing so at that time, at this meeting. Without something to refresh my memory, I could not say, Mr. Steffen. I refer to, in the letter here, or Mr. Avery refers to the "other plan". That had reference to the proposed merger if it went through.

Q. And Mr. Avery states that he is favorable to that. Did he say anything about the proposed merger at the time

of your negotiations with him here?

A. Not that I remember of it, at this time.

Q. Did you discuss with him at that time whether or not the merged companies might take out a license agreement?

A. I couldn't say, without something to refresh my memory of a discussion of that kind, and this doesn't mention that. But I did discuss it with him at some time, but I couldn't say the date.

Q. Did you discuss with Mr. Avery at this time the

disturbed price conditions in the industry, or not?

A. Well, I couldn't say as to that, Mr. Steffen, without

something to refresh my memory.

Q. We have shown you practically all of your correspondence for 3 or 4 years, and we are not able to refresh your recollection further. We want your present recollection as to whether, at this conference, there was any discussion of the disturbed price conditions then prevailing?

A: I don't remember of it at this time.

Q. Did you ever discuss with Mr. Avery disturbed price conditions, do you now remember?

A. I would say yes, at some times, but I couldn't give the dates.

Q. I don't want the dates now.

A. Yes, I have discussed that. Q. What did you say to Mr. Avery in regard to disturbed price conditions at any one of these meetings with Mr. Avery?

Mr. ADAMS. I think that ought to be limited somewhat, Your Honor. I appreciate that he can't give the dates, but I think we ought to have it reasonably placed with reference to time and the place where the conference took place. Otherwise, we can't meet it.

Justice STEPHENS. Could you say, Mr. Griswold—the Court doesn't expect you to remember just the date—but could you say about what time it took place, or could you identify the conversation by any circumstance or occurrence or other event, and attempt to place it in some way a little more definitely, when it took place or where?

The WITNESS. Well, I could not, of course, state the time, but it was probably along during this 1927 period, because it was at that time that the prices began to be disturbed on account of this litigation and threatened litigation over this patent infringement, and any discussion that I had with Mr. Avery was really not a discussion, it

was just a talk about the conditions that existed as as I had learned them and reported to him that we found existed in certain territories. And he possibly

might have given me some information of what they had learned about prevailing prices—

Justice STEPHENS (interposing). Where, ordinarily, did you have these discussions with him? Did he come to your place of business or did you see him at Chicago, or where?

The WITNESS. It was usually at Chicago, I usually called on Mr. Avery when I was in Chicago, if he was there, and if he wasn't too busy, at his office.

#### By Mr. STEFFEN.

Q. I think you testified—well, I will ask you a question this way: Did you ever report to Mr. Avery, or discuss with Mr. Avery, the names of any companies which were,

as you thought, disturbing price conditions?

A. Well, I could not say definitely without something to refresh my mind, but I evidently did, because I considered it was simply a question of market quotations, and there was nothing about it that we didn't have a perfect right to do, to talk about the conditions as we knew they existed in this or that territory. They were selling all over the United States, they had a national distribution; whereas, in our case, we were local in certain territory, limited by freight rates.

Q. All right. Who were your competitors in your territory?

A. Do you have reference to board?

978 Q. Wallboard and wall plaster. A. Plymouth Gypsum Company was one.

Q. They were plaster manufacturers, were they?

A. They were plaster manufacturers, and they also manufactured board.

The Acme Cement Plaster Company, after they acquired the plants at Grand Rapids, Michigan, were competitors of ours in that territory.

Q. Did the Acme continue to be a competitor of yours,

or was it taken over by some company?

A. They were taken over by the Beaver Board Company later on.

Q. Was Beaver Board a competitor of yours?

A. Yes.

Q. All right. Mr. Griswold, are you correct in your testimony that Beaver took over the Acme? Was it not Certain-teed?

A. Possibly it was, it is too far back for me to remember all the details.

Q. Let me ask you, was Certain-teed selling in your territory during 1927 and 1928, to your knowledge?

A. From Grand Rapids, yes.

Q. Were they a competitor of yours?

A. Yes.

Q. Were they maintaining stable prices?

979 . A. I want to amend that answer-

Justice STEPHENS (interposing). Just a minute, Mr. Griswold, before we have you answer there is an objection.

Mr. Adams. I object to the form of that question as calling for a conclusion and as not being the proper way to prove the prices.

Justice STEPHENS. Read the question. (The question was read by the reporter.)

Mr. Steffen. The question is whether or not the Certainteed Products Company, in selling in your territory, were maintaining stable prices?

Mr. ADAMS. I renew the objection, which I think in his rephrasing of the question makes the reason for the objection more apparent. The question calls for a conclusion.

Justice STEPHENS. If the question is to be interpreted by the Court, Mr. Adams, as the conclusion of the witness on a legal question as to whether there was some illegal maintenance of prices being kept, it would be improper. But I take it that what the question means is—were the prices running along at about a given level at this-time. Is that what you mean?

Mr. STEFFEN. Yes.

Justice Stephens. The objection is overruled.

Mr. ADAMS. Under those circumstances, I think the time should be specifically stated.

Mr. Steffen. It is clear enough, about the time of this conference with Mr. Avery in June of 1927.

Justice GARRETT. The witness stated he wished to make a correction.

Justice STEPHENS You may state what you wished to do or say; we interrupted you.

The WITNESS. I was getting confused, being located out West in Des Moines, Iowa, and afterwards here, but my answer is correct that the competition we had was with reference to the Ohio territory, it is all right.

Justice STEPHENS. And about what time are you speaking of now?

The WITNESS. 1927.

By Mr. STEFFEN.

Q. And did you discuss with Mr. Avery this competition

in the Ohio territory?

A. I do not remember of discussing it particularly any more than, as I have said, possibly we might exchange information on what prices we learned were being asked at that time, and what the prevailing market was or about what it was; and outside of that I have no recollection.

Q. You have said that the market was disturbed. Can you give the Court a better idea of how disturbed it was at

this time?

A. Not without something to refresh my memory, Mr.

Steffen. That is too far back.

981 Q. Was No. 1 board selling at \$30 at this time? A. I couldn't say as to that, at this time.

Mr. STEFFEN. I would like the reporter to read the question to which Mr. Adams objected. I don't think it has been answered yet.

(The question referred to was read by the reporter as

follows:

"The question is whether or not the Certain-teed Products Company, in selling in your territory, were maintaining stable prices?")

Justice Stephens. By that, the Court explained that it understood the question to mean whether or not the Certain-teed Products Company's prices were running along at about a certain level at about this time. If you don't understand at any time, you should not hesitate to say so.

The WITNESS. Well, I think I understand the question, your Honor, but there were so many dates and so much transpired that to fix any particular time it is very difficult. There was a time when there was a disturbance in prices, even by Certain-teed Products Company, from the information I got, but whether it was actually in existence at this time or not, without something to refresh my memory it is pretty hard to remember those things.

Justice STEPHENS. Would you say at about what time it was with respect to the year or period of years?

The WITNESS. As I remember it, the disturbance started sometime in 1927, possibly the latter part, and continued through until 1928, until after I had gotten out of the gypsum industry, or gypsum business, as I remember it now.

By Mr. STEFFEN.

Q. Now, I want to know how serious that disturbance was.

Mr. Bromley. I object to that as calling for a conclusion.

The WITNESS. Well, I couldn't answer-

Justice STEPHENS (interposing). Just a minute. Well, the witness has in effect stated that he didn't know.

983 However, you are entitled to a ruling on your objection. The question should properly be—state what the disturbance was, and then let the Court conclude how serious it was.

By Mr. STEFFEN.

Q. Will you state what the disturbance was, in terms of amount?

A. Well, there were a number of different commodities that were on the market at that time. When you say "prices", one particular line might be disturbed and another not.

Q. All right.

A. For instance, some of these manufacturers were manufacturing wallboard and manufacturing other lines, including blocks and wall plaster and other products. Now, when the disturbance did occur it might only apply to one particular line, and not to the whole general line of products that each one made. So, without something to fix it definitely in my mind, I can't give that information definitely.

Q. Was the Certain-teed Products Company selling board

or plaster in your territory during 1927?

A. Well, after they got their Grand Rapids, Michigan, plant completed, they began selling board in our territory.

Q. And were they making an open-edge or closed-edge board at this time?

A. They were making an open-edge board, as I remember it.

Q. And did they charge the same price for their open-edge board as you were charging for your closed-edge board, do you remember?

A. No, I do not remember at this time.

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Q. Did they ever charge the same price for their openedge board as you charged for your closed-edge board?

A. No, they did not. Sometimes we learned of Acme's quotations being lower than we were making, and possibly lower than some of the other concerns were making. They had opened up this new plant at Grand Rapids, Michigan, and we weren't so very much surprised at that, because they naturally wanted to get some business, and they were probably offering some inducement to get it, which was usual with new concerns or concerns in new territory.

Q. Do you recall whether you ever talked about Certainteed's sales in your territory during 1927, with Mr. Avery?

A. No, I do not recall without something to refresh my memory on that, Mr. Steffen, that is too far back.

Q. I show you now Government's Exhibit No. 132, which is in evidence, and you have identified it. I would like to have you look at the third paragraph to refresh your recollection as of this period in January, 1927, the third paragraph; read it carefully and see if it refreshes your recollection. Does that refresh your recollection as to the time when these disturbed market conditions started, and as to who was disturbing the market?

985 A. Just a minute, I haven't finished this letter yet.

Justice Garrett. What was the D-number of that exhibit, Mr. Steffen?

Justice STEPHENS. D-34.

Justice GARRETT. Thank you.

The WITNESS. Yes, this refreshes my mind about the time.

Mr. ADAMS. Will you read the question, please?

Mr. Steffen. There is no question. I simply asked him if it refreshes his recollection, and he said that it did.

Mr. ADAMS. What about?

Justice STEPHENS. About the time when conditions were disturbed.

The WITNESS. That there was disturbance at this time, January 3, 1927.

By Mr. STEFFEN.

Q. And did that disturbance continue during 1927 and 1928?

A. Yes, I would say it did.

Q. Did it grow greater or smaller?

A. Well, greater.

Q. Did you talk to Mr. Avery at any time about that

price disturbance, during 1927, let us say?

A. Well, I could not say at this time either, without something to refresh my memory as to dates. 1927 is a long ways back, and I got out of the business and ran into some more trouble right immediately afterwards.

986 which took my mind off of it entirely.

Mr. STEFFEN. I would like to offer in evidence now Exhibits Nos. 160, 160-A and 161.

Justice STEPHENS. Let the Marshal hand them to the Court, please, let us look at them.

Mr. Steffen. I think you will find them on the witness' desk, Mr. Marshal.

. (Exhibit No. 160-A was handed to the Court.)

Justice STEPHENS. What are those numbers?

Mr. STEFFEN. 160, 160-A and 161.

Justice STEPHENS. We have here only 160-A. .

(Government's Exhibits Nos. 160 and 161 were handed to the Court.)

Justice STEPHENS. Is there any objection to these exhibits?

Mr. Bromley. No objection other than the usual one.

Justice STEPHENS. They may be received, subject to the usual reservation with respect to the declarations of one co-conspirator as binding upon another, without proof of a conspiracy.

(The letters referred to, marked Government's Exhibits

Nos. 160, 160-A and 161, were received in evidence.)

By Mr. STEFFEN,

Q. I believe you testified, Mr. Griswold, that a part of the market disturbance in 1927 was caused by the litigation concerning patents. Is that correct?

A. That is my recollection of it now.

Q. Was that the only reason why there was a price disturbance in 1927? I call your attention to the fact that

Certain-teed was not being sued at that time for patent violation—were they?

A. Well, I can't say that they were at that time.

Were they making a closed-edge board?

A. No, they were making an open-edge board at Grand Rapids, and I understand also at Acme, Texas—that is my recollection.

Q. And you would say now that they were not being sued for patent infringement, because they were making an open-edge board, is that right?

A. That is my recollection; there was no suit on open-

edge board.

Q. On two occasions it appears in the record so far that you saw Mr. George Brown, and you wrote to Mr. Gloyd in April, 1927, in which you said that you were about to go to New York and would, with some others, see Mr. Brown.

A year later, you wrote to Mr. J. H. McCrady, Government's Exhibit No. 141, and told him that you had just spent two and a half hours in New York talking to Mr.

George Brown. He was the president of the Certainteed Products Company. They were not being sued for patent infringement. Now, I would like to know

what you discussed with Mr. Brown, particularly concerning the price disturbances which were prevailing, as you have told us, in 1927.

Mr. Bromley. Of course, the fact is that they were being sued on the second occasion referred to by Mr. Steffen in his question.

Mr. Steffen. They were not being sued for patent infringement at that time.

Justice STEPHENS. Well, the Court can't resolve that question, and statements are being made to refresh the recollection of the witness. If there is any issue in the case as to whether they were being sued, I think that the records will show. You should be guided by your own recollection finally, Mr. Griswold; these questions are only designed to help your recollection.

The WITNESS. State your question.

By Mr. STEFFEN.

Q. That you wrote Mr. Gloyd, in April 1927, that you were going to see Mr. Brown in New York; and you wrote to Mr. McCrady a year later that you had just spent two and a half hours in New York talking to Mr. Brown, the president of Certain-teed Products Company—and I call your attention to the fact that, at least in 1927, Certainteed was not being sued for patent infringement, and that they were, as you know, making an open-edge board, and you have already testified that they had been making a disturbance in prices—

Mr. ADAMS (interposing). I don't think that is the testimony. I object to the question including that language.

By Mr. STEFFEN.

Q. Did you or did you not discuss price disturbances with Mr. Brown in New York?

Justice STEPHENS. The Court thinks the objection is well taken with respect to that portion of the question which said that Certain-teed had disturbed prices. The witness has not testified as to that. With that exception, answer the question, if you remember your conversation with Mr. Brown—what did you talk about?

By Mr. STEFFEN.

Q. About prices?

A. Well, I do not remember any discussions about prices. I had other business with the Certain-teed Products besides wallboard. They had taken over the Beaver Products Company and they had a paper plant over at Thorold, in Canada, and manufactured wallboard paper such as we used in covering this board, and for quite a time we used their paper, and we used paper from the old Beaver Products Company that we bought, and from the Consolidated Paper Company up in Monroe, I forget the name of the place now. But at times we had difficulty getting paper, as someone has already stated, satisfactory for our

ably to the finish on the paper surface, and we were trying all over the country to get the best paper we could get for that board, and the Certain-teed Products, having taken over the Beaver Products and the American Cement Plaster Company, the American Cement had had quite a lengthy experience in manufacturing board, they and the old Best-Wall, with which they were somewhat associated, and I felt that that plant over there ought to be pretty familiar with just what was the best thing to do i manufacturing paper of that type. In fact, we saw the samples of their products, and we bought quite a little paper. And another thing—

Justice Stephens (interposing). Are you telling what you talked about with Mr. Brown?

The WITNESS. Yes, sir. My dealings were principally with Mr. Brown. He afterwards might have referred me to somebody else, but at this time my dealings were with Mr. Brown.

And furthermore, they decided to go into the gypsum block business, the manufacture of gypsum block, as I remember it, at their plant at Grand Rapids, Michigan, and

they were interested in rotary block machinery.

I had introduced the Payne machine that made continuous blocks by a rotary process, and also had put in one of the first rotary machines made by a concern at Sandusky, Ohio, that made blocks under a continuous rotary process, and

I remember their engineers were down at our plant 991 to investigate those machines; and I remember at one time, I couldn't remember any date, we discussed whether these machines were a success or a failure, and knowing that I had had experience in that line. Mr.

Brown naturally wanted to hear from me.

These other manufacturers whom I all knew, kind of picked on me, imposed on me. When anything new came out, usually I was the first one to try it and demonstrate it, and after I got it working—

Justice STEPHENS (interposing). Mr. Griswold, the Court doesn't want to stop you unduly, but what counsel is inquiring about is whether or not you discussed prices with Mr. Brown. Now in effect, you have been answering that in the negative, by telling us that you discussed other things. But come back to the question of prices. Did you discuss prices with him?

The WITNESS. I have no recollection— By Mr. STEFFEN.

Q. (Interposing.) If I may, I would like to show you two letters, and I would like to ask you to look very carefully

at the second paragraph of Exhibit 159. It says:

"I am leaving on this afternoon train for New York City where a number of us will meet in conference, and we hope to straighten out Mr. Brown of the Certain-teed Products Company. There is a little question in my mind but what we will be able to induce Mr. Avery to enter into the license

agreement with them", et cetera.

That was in April, 1927.

In April, 1928, you say:

"You remember I reported when I was in New York I had a two and one-half hour conference with Brown, at which time he stated very plainly to me that they were

willing at that time to enter into a license agreement without any particular changes in it providing all of the manufacturers, including Ebsary, would enter into it and make it one hundred per cent."

Now I ask you to tell the Court in your own words any

conversation you can remember—

Justice Stephens (interposing). Judge Garrett raises the point, Mr. Steffen, that this is in violation of our ruling that these excerpts shall not be read into the record. They may be shown to the witness and shown to the Court.

Mr. STEFFEN I had no intention of reading them into the record, but I wanted to get the witness clearly refreshed on those two paragraphs.

Justice STEPHENS. Take your time and read it, Mr. Griswold.

The WITNESS. I have finished.

By Mr. STEFFEN.

Q. Now, my question is, do you remember whether or not, on either of these two occasions, you discussed the matter of price disturbance with Mr. George Brown?

Mr. Adams. May I object here on the ground that as to the first of those occasions the letter just says that he is going to New York, it does not say that he went there or that he had a meeting with Mr. Brown or anybody else when he got there.

Justice STEPHENS. Well, the question may, as phrased, technically assume a fact not in evidence, but I think it is fairly clear to the witness that he is being asked whether or not, at any conferences with Mr. Brown in New York, he discussed the question of prices, and whether or not these letters refresh his recollection on that subject. With that interpretation by the Court, the witness may answer.

The WITNESS. Restate your question.

By Mr. STEFFEN.

Q. The question is, to restate it—on either of these two occasions, state whether or not you discussed with Mr. Brown the matter of disturbed price conditions.

Justice STEPHENS. Let the Court understand what the question means by "either of these two occasions".

Mr. Steffen. The first one, which is mentioned in Exhibit 159, and the second in Exhibit 141. One was written

in April, 1927, and the other in April, 1928, and in both, as I read very carefully, the witness mentioned conferences or prospective conferences with Mr. Brown.

Justice Stephens. Very well, you may answer the question.

The Witness. I don't remember any discussion with Mr. Brown about prices any more than the possible markets that existed over the country at that time as we had learned them, what his quotations were, and what other people were quoting. We probably discussed those, but I couldn't say definitely at this time.

By Mr. STEFFEN.

Q. Will you state whether or not you discussed the license agreements on either or both of these occasions?

A. I would say that we did.

Q. Now, I want to direct your attention to the statement in your letter to Mr. Gloyd, Government Exhibit 159, appearing at the end of the second paragraph, in which you

refer to one hundred per cent.

I next want to direct your attention to your letter of January 3, 1927, Government Exhibit No. 132, addressed to Mr. Avery, in which you again refer to one hundred percent of the manufacturers of wallboard, and ask you this question.

Was it your purpose, if possible, to have one hundred per cent of the wallboard manufacturers take out a license

agreement?

A. I would have liked to have them take it out. The Certain-teed and the Universal and the National already had, at this stage, taken out their license agreements.

Q. Certain-teed had not, had it?

A. No, I guess I am wrong about that.

Q. Universal had?

A. Universal had, and National.

995 Q. And the Beaver Products had? A. Yes.

Q. Had the National?

A. I think-

Q. (Interposing.) As a matter of record, the National didn't take one out until 1929.

A. They were talking like they were going to at that time, when they were talking with me. That left only the people that I was going to include in this merger, the Texas Cement Plaster, the Niagara Gypsum, the Empire Gypsum, and the Atlantic Gypsum Company. They went in

with Universal, and National. The only one that would be left out would be Certain-teed up to that time, and if they went in, that would make it one hundred per cent, which I had said to Mr. Avery that I was confident that I could convince them that it was the sensible thing to do from the standpoint of cost of manufacture, if nothing else. They could manufacture a closed-edge board cheaper than they could the open-edge board.

Q. What did Mr. Avery say to that? A. I don't remember what he said.

Q. Did he object to having you talk with them?

A. I don't remember what he said.

Q. Was he favorable to it, would you say?

A. At first, Mr. Avery was opposed to this license agreement.

996 Q. At what time?

A. Well, at the early stages of the game, I remember, he didn't think very favorably of the license agreement. But later on I think he changed over and was in favor of the license agreement provided he got what he wanted.

Q. What did he want?

Mr. BROMLEY. I move to strike out that entire answer as speculative and as a conclusion.

Mr. STEFFEN. I think that answer is very much to the point. I would say that it is probably the best evidence that we could get as to what Mr. Avery's attitude was. Mr. Griswold has said that he had seen Mr. Avery on many occasions, and written to him on many occasions, and that he had discussed the board-licensing agreement with him, and he communicated to Mr. Avery that he wanted to get a hundred per cent, and I want to know whether Mr. Avery was favorable to that. Mr. Avery may have said he was favorable, or he may have given that impression, and the impression he gave is just as important as words.

Justice STEPHENS. Read the answer.

Mr. Steffen. May we have both question and answer?
(The question and answer referred to were read by the reporter as follows:

"Q. At what time?

"A. Well, at the early stages of the game, I remember, he didn't think very favorably of the license agreement. But later on I think he changed over and was in favor of the license agreement provided he got what he wanted."

Justice Stephens. The Court realizes the difficulties counsel is under, and realizes, of course, that counsel in the best of faith thinks these conversations took place, because there apparently are records here which would so indicate, and it is of course true, Mr. Steffen, that witnesses may testify as to certain types of impressions, such as hostility, or nervousness, and many inferences which we all make which can be testified to. But this witness has said on many occasions this morning that he can't remember having a conversation with Mr. Avery on the subjects, and it seems to us that this question as phrased and the answer as given, is simply a running conclusion on the part of the witness as to his interpretation of Mr. Avery's reactions to this situation during this period of years involved. And we think that it is not competent, and the objection is sustained.

Mr. STEFFEN. Might I make just a point?

Justice STEPHENS. Certainly.

Mr. STEFFEN. That I think I am entitled to Mr. Griswold's impressions and his interpretations of his conver-sations with Mr. Avery. They are just as relevant and just as material and just as competent. The Court may not weigh them very heavily in view of Mr. Griswold's difficulty in remembering, but the fact that he did regard

them as favorable is a fact which is provable.

Justice STEPHENS. Well, that depends on what they are being offered for. We understand your conten-

tions clearly, you have made yourself.very clear.

As to relevancy, there is no objection being made, but it is not competent, the rules are well settled that a witness cannot be asked to testify to his impressions or interpretations of a conversation. He is entitled to testify to the conversation. If he can't remember the words, he is entilted to give the substance of it and the effect. But it is the duty of the Court, not of witnesses, to put an interpretation upon things. If the witness had made a statement to Mr. Avery on the subject, then the witness of course could say that Mr. Avery did not object, because that is in the nature of describing a speaking silence.

If you want to have this witness testify that his view in dealing with Mr. Avery was that an agreement of this sort as described here could be reached, to indicate that this witness; as a member of a conspiracy, alleged, was himself favorable to an agreement, that would be, perhaps, competent, but not to bind Mr. Avery. The law is well settled to the contrary.

Mr. Steffen. Then I would claim the answer as showing Mr. Griswold's state of mind, not for purposes of proving the truth of the assertion that Mr. Avery was favorable, and I have a number of cases that would establish that point.

Justice Stephens. It may remain in the record to indicate this witness' attitude towards the agreement, but not to bind the United States Gypsum Company or other defendants.

By Mr. STEFFEN.

Q. I again refer you to your letter of January 3, 1927, Government Exhibit 132, in which you told Mr. Avery that in the beginning you had started out to deliver one hundred per cent of the manufacturers of board. I will ask you why you started out to deliver one hundred per cent of the manufacturers of board.

Mr. Bromley. I object to that as incompetent and as calling for a conclusion.

Justice STEPHENS. Well, the Court cannot tell until it hears the answer. You may reserve the right to strike if it appears to be incompetent or irrelevant.

The WITNESS. Well, that simply had reference to the fact that at the beginning of this—

Mr. Steffen (interposing). I will show you some references later on.

Mr. BROMLEY. May he finish his answer, if the Court please?

Justice STEPHENS. Yes. What did you say, Mr. Gris-wold?

The WITNESS. That as I remember it, it simply had reference to the fact that at the beginning of efforts along this line, I voluntarily stated to Mr. Avery that I thought I could deliver one hundred per cent.

Justice STEPHENS. I think you are not answering the question counsel is interested in now. He wants to know why you desired to have one hundred per cent.

The WITNESS. Well, as to that, I thought it would be the best thing for the industry, that is, this litigation and threatened litigation, was creating such an ill feeling, and

having seen what had happened in my former years when people got into litigation, I though it would wind up in a demoralized condition that probably would be very disastrous to me, especially, in its effects on this merger, and I was anxious to see the litigation wiped out, and I thought I could convince these people that they were making a mistake in not taking out a license, because they could make the board under the license as cheap, or cheaper, than they could make something that brought about a conflict.

By Mr. STEFFEN.

Q. Now, when you spoke about litigation-

Justice Stephens (interposing). The Court is bound to rule. Do you object to that question now, Mr. Bromley?

Mr. BROMLEY. No, sir.

Justice STEPHENS. Proceed.

By Mr. STEFFEN.

Q. Now, when you speak, as you did just now, of litigation resulting in demoralized conditions, what did you mean?

A. Well, as a usual thing, when concerns get 1001 mixed up in litigation over a patent, or something of that kind, they get so bitter at each other that they being trying to cause each other loss and damages by reducing market prices to such an extent that it would affect the other person. That was the result of this feeling engendered by the litigation, and that is what I had reference to, that if this litigation continued, it might wind up that way to demoralize the whole industry.

Q. Did that occur in the industry, the demoralization of

the whole industry?

A. The prices were more or less demoralized, not totally,

but they were in pretty bad shape.

Q. I now show you Government's Exhibit No. 162, Mr. Griswold, which purports to be—that is D-75—which purports to be a letter from J. H. McCrady to John A. Kling, under date of August 8, 1927, and ask if you can identify Mr. McCrady's signature.

A. Yes, I would say that is J. H. McCrady's signature.

Mr. Steffen. I offer Government's Exhibit No. 162 in evidence.

Justice STEPHENS. Is there any objection?

Mr. ADAMS. Do I understand that both these men are dead, Mr. Kling and Mr. McCrady?

Justice Stephens. Mr. McCrady is dead, it has been so testified.

By Mr. STEFFEN.

1002 Q. Is Mr. Kling living? A. No, he is deceased.

Q. Do you recall about when he died? A. It was after 1928, as I remember.

Q. It must have been. You don't recall?

A. No. I don't recall the date.

Justice STEPHENS. Who was Mr. Kling?

The WITNESS. Mr. Kling was one of the largest stockholders in the American Gypsum Company. He was with the Kelly Island Lime and Transport Company; also the Cleveland Builders' Supply Company.

Mr. Bromley. I assume this came out of the American's files, did it not, Mr. Steffen?

Mr. STEFFEN. Yes.

Mr. BROMLEY. Then I have only the general objection.

Mr. ADAMS. I would like to preserve my objection, that there is no proper foundation.

Mr. STEFFEN. Your Honors have overruled that objection on a previous case.

Justice STEPHENS. I think that has been ruled on, in effect. We think it is sufficiently identified. It is received subject to the general reservation with respect to declarations of co-conspirators, or alleged co-conspirators. The Court doesn't yet see its relevancy, Mr. Steffen, but it may be connected.

Mr. STEFFEN. I think it is relevant purely as showing Mr. Kling's connection with this.

By Mr. Steffen.

Q. Who was Mr. McCrady? I think you have testified he was president of the company, have you not?

A. President of the American Gypsum Company.

Q. Was Mr. Kling a gypsum man?

A. Well, he claimed to be, but I never thought so.

Q. I now show you Government's Exhibit 163, being D-76, which purports to be a letter from Mr. Avery to Mr. Kling under date of September 20, 1927, and ask if you can identify Mr. Avery's signature.

A. Yes, I would say that that was Mr. Avery's signature.

Q. I now show you Government's Exhibit No. 164, being D-83, which purports to be a letter from Mr. Kling to Mr. Avery, under date of October 15, 1927, and ask if you can identify Mr. Kling's signature.

A. Yes, I would say that that was Mr. Kling's signature.

Mr. Steffen. I now offer in evidence Government's Exhibits 163 and 164. They were taken from the files of the respective companies, and one identifies the other as being a reply.

Justice Stephens. You are offering Exhibits 163 and 164?

Mr. STEFFEN. Yes.

Justice STEPHENS. The letter from Mr. Avery would seem to be admissible, subject to the general reser1004 vation with respect to declaration of an alleged coconspirator so far as the other defendants than United States Gypsum are concerned. The Court would like to inquire, it isn't quite clear, how the statements of Mr. Kling could be binding upon American Gypsum, since he was only a stockholder.

Mr. Steffen. Was Mr. Kling at this time, which was in 1927, a member of the Board of Directors, do you recall, Mr. Griswold?

The WITNESS. I could not say without something to refresh my memory.

Mr. Steffen. Well, I think that we will fully show Mr. Kling's connection with this matter. We have a resolution of the Board of Directors later on which authorizes him to deal—

Justice Stephens (interposing). They may be received, subject to connection.

(The letters referred to, marked as Government's Exhibits Nos. 162, 163 and 164, were received in evidence.)

Mr. STEFFEN. He was, in fact, a Director all during this time, being a principal stockholder; and later he became Chairman of the Board.

Mr. Bromley. I don't think he was, Mr. Steffen, at all. Justice Stephens. As stated, they are received, subject to connection.

1005 Mr. STEFFEN. We have a series of letters between Mr. Avery and Mr. Kling, and this is merely a preliminary letter.



(Thereupon, a short recess was taken, after which the hearing was resumed.)

1006 Mr. JOHNSTON. If the Court please. In view of Judge Garrett's comment about those copies, and in order that I may be exonerated, if you will look on counsel table for the Government I think you will find Judge Garrett's copy.

Mr. Steffen. We have no recollection of that ever coming here, but it is here now.

Justice STEPHENS. Proceed, gentlemen.

By Mr. STEFFEN.

Q. I now show you, Mr. Griswold, what has been marked for Identification Government's Exhibit No. 165, which is D-79, which purports to be a letter from Mr. Avery addressed to Mr. Kling, under date of October 27, 1927, and I ask you if you can identify Mr. Avery's signature?

A. Yes, I would say that that was Mr. Avery's signature:

Q. I now show you, Mr. Griswold, what has been marked as Government's Exhibit No. 166, which is D-84, and which purports to be a letter from Mr. Kling to Mr. Avery, under date of October 28, 1927, and ask if you can identify Mr. Kling's signature?

A. Yes-well, I think that is a stamp, but it is a fac-

simile of his signature.

Q. Will you examine it carefully?

A. I wouldn't say, but it is a facsimile, anyway. I would identify his signature from that.

1007 Q. Can you identify the handwriting at the bottom of Exhibit No. 166?

A. No, I can not. Q. At the top?

A. No, I don't know whose writing that is, I don't recognize the writing.

Mr. ADAMS. I would like to record my objection, that no proper foundation has been laid.

Mr. Steffen. It hasn't been offered yet, Your Honor.

Mr. ADAMS. If it is offered. I thought it had been offered, Your Honor.

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 167, Mr. Griswold, which is D-80, which purports to be a letter from

Mr. Avery to Mr. Kling, under date of November 16, 1927, in reply to Mr. Kling's letter of October 28, and ask if you can identify Mr. Avery's signature?

A. Yes, I would say that was Mr. Avery's signature.

Mr. Steffen. I now offer both Exhibits Nos. 166 and 167. I think 167 identifies 166.

Justice Jackson. Have you offered 165, Mr. Steffen?

Mr. STEFFEN. I will offer 165 at the same time.

Justice STEPHENS. Are those all offered?

Mr. STEFFEN. All three, 165, 166 and 167.

Justice STEPHENS. Received in evidence, subject 1008 to the general reservation with respect to declarations.

(The letters referred to, marked as Government's Exhibits Nos. 165, 166 and 167, were received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 168, which purports to be a letter from Mr. Kling to Mr. Avery, under date of November 18, 1927, in reply to Mr. Avery's letter of the 16th. This is D-85. I ask if you can identify Mr. Kling's signature on that letter?

A. Yes, I would say that that was Mr. Kling's signature.

Mr. STEFFEN. I offer Government's Exhibit 168 at this time.

Justice STEPHENS. Received in evidence, subject to the same general reservation with respect to declarations of co-conspirators; and all of these last four exhibits are received subject to connection showing Mr. Kling's authority. to act for the American Gypsum Company, so that these declarations would be binding upon it.

(The letter referred to, marked as Government's Exhibit No. 168, was received in evidence.)

Mr. STEFFEN. I would now call attention to the fact that we are going to break the chain of Kling-Avery letters, and I will have to come back to that.

1009 Justice STEPHENS. Very well.

## By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 169, which is D-68, which purports to be a letter from Mr. Griswold to Mr. Avery, under date of July 7, 1928, and ask if you can identify that letter?

Justice Stephens. Who does that purport to be signed by?

Mr. Steffen. It purports to be signed by Mr. Griswold.

The WITNESS. Yes, that is my original letter to Mr. Avery.

Mr. Steffen. I offer Government's Exhibit 169 in evidence.

Justice Stephens. It may be received subject to the usual reservation.

(The letter referred to, marked as Government's Exhibit No. 169, was received in evidence.)

By Mr. STEFFEN.

Q. Do you know whose initials those are, "C.H."?

A. I do not, but they might have been Mr Henning's initials, I don't know.

Q. I now show you Government's Exhibit No. 170, which purports to be a letter from Mr. Griswold to Mr. Davis, under date of September 22, 1928. This is D-70. I

1010 I ask you to read that carefully and tell me if you can identify that as your letter?

A. Yes, that is my original letter to Mr. Davis.

Q. Will you state to the Court the type of board that you recite in the letter that you commenced making following the decision in 1928, which went in favor of the United

States Gypsum Company?

A. Well, it was really an open-edge type board. To look at the edge of the board it would appear as an open-edge type, the paper ending at the edge of the board. But in between the top and bottom papers, and the gypsum sludge that we used to fill in between, during this process of going under the rolls, under the continuous process, we had inserted in each side, this side and this side, a tape. It was a very thin, open-mesh tape that we doubled and pressed in there, pressed it in and let the gypsum squeeze in around it under pressure, and it was smoothed down.

Justice Stephens. That was under the paper, between the paper and the slurry?

The WITNESS. Yes. It was a coarse-meshed tape, I forget what we called it. It was something we bought especially for that purpose.

Justice STEPHENS. Did it run across the board or along the edge?

The WITNESS. It ran along the edge. There was 1011 a paper top and bottom, but there was no paper over the edge, but this cloth tape that was pressed in to reinforce, in a way, the edge.

One of the difficulties with wallboard was, in shipping

and handling the board, that the edge got mashed up.

Justice STEPHENS. Was that put on both sides of the board?

The WITNESS. Yes.

Justice STEPHENS. And around all four edges?

The WITNESS. No, it was made this way, in a continuous process, but where we sawed it off or cut it into lengths, 10 feet or 8 feet, those edges would be raw.

By Mr. STEFFEN.

Q. Do you recall whether you were able to hold your customers with that type of board?

A. Well, I wouldn't say we held all of them, but we held

all we could.

Q. Could you tell us how many, roughly? Were you able to hold most of them, or did you lose most of them?

A. The greater part of them we held, who had been our

customers for years. They were pretty loyal.

Q. Was that a satisfactory type of board to make, from a manufacturing standpoint?

A. I would say no.

Q. Why?

this tape in the edges of the board, and also very difficult to hold it there so that when the material set and hardened that both edges of the board showed a smooth appearance. Lots of times the gypsum slurry would squeeze over on the top or bottom of the board, and sometimes it didn't fill out and the edges were imperfect. The objection was that it was too expensive to make, we had too many culls or seconds, as we called them.

Q. Was it more expensive to make than a board with

the Utzman closed edge?

A. Yes, I would say it was.

Q. Was it more expensive to make than a board having

an open edge, a wholly open edge?

A. Yes, because we had all the paper on this board that an open-edge board would have, and in addition to that we had the expense of this tape on both sides.

Q. Do you have any figures as to the difference in cost of making your board and the Utzman closed-edge board?

A. No, I have not.

Q. What was your understanding as to the difference in cost between making an open-edge board and making. a closed-edge board by the Utzman patent?

A. You mean in figures, what was the difference?

Q. Yes, about how much per thousand more would it cost, or less would it cost, either way?

1013A. Well, that was pretty hard to determine, because it depended on the luck you had. If you didn'thave so many seconds, or boards that you had to throw away entirely, your cost wouldn't be so high on the Birdsey type. But if, as did happen frequently, we had a very high amount of seconds, then your cost would go higher. I would say probably in the neighborhood of \$1.50 or \$2 a thousand. average, including what we lost by throwing away.

Q. That is, you could save that if you made a closed

board under the Utzman patent?

A. Yes, because there was a lot of waste; we had to trim an open-edge board, and there was waste in that. And I would say the cost on that would run some place around there. It was a hard matter.

Q. Of course, it would vary with different companies, but

your figures are roughly \$1.50 to \$2?

A. Yes, I would say somewhere around there.

Q. Having looked at Government's Exhibit 170, which is dated September 22, 1928, does that refresh your recollection as to the price of board and the price of plaster at that time? I call your attention to the second and third paragraphs. Please read them again, and I direct your attention to the matter of the price situation.

A. Yes, it does.

Q. You say in here that the price of board is getting down as low as \$12 at the mill. Is that for 1014 first grade or seconds, open-edge, or what?

A. As I remember it, we had heard of quotations as low

as \$12 a thousand square feet on No. 1 board.

Justice Jackson. Closed-edge?

The WITNESS. Closed-edge board.

By Mr. STEFFEN.

Q. Closed edge board? A. Yes. But it was only just probably rare occasions, maybe on some specific contract or something of that kind, but market conditions were not that low, as I remember now.

Q. All right. What was the prevailing rate for No. 1 closed-edge board at that time, what was your rate?

A. You mean in our territory?

Q. Yes. A. Well, I can not-

Q. (Interposing.) We don't want to hold you to the precise penny, we want your general recollection merely.

A. I would say it was down somewhere around between \$20 and \$25 a thousand square feet at that time, but that

is just my recollection of it.

Q. Now look at the third paragraph, and tell us what the average plaster prices were at about this time, if you can remember?

A. How do you mean, prices including paper bags,

1015 or jute bags?

Q. Any way, any way you remember it. Look at the third paragraph of your letter and tell us what you meant when you said that the average price of plaster was about \$5? What does that mean?

A. I think that had reference to plaster in paper bags. as my recollection is that by the time mentioned in this letter the industry had changed over and was not using very many jute bags, they had changed over to paper bags.

Q. And was this sanded plaster or was this neat plaster?

A. No, this has reference to what we call neat plaster, unsanded.

Q. And was that the correct price, as you remember?

A. As I remember it; I so state here.

Q. Now you have been in the business for a long while. Did it always sell at that same price?

A. It did not.

Q. State in previous years, any one you wish, a different price?

A. The price for some time was \$10 per ton, including

bags, f.o.b. the mill.

Q. And that compares with this \$5 price that you are mentioning here?

A. Yes.

Q. What time do you have in mind at which it was

selling at \$10 f.o.b. mill?

A. Prior to the time this disturbance came in here, and the litigation over the patent, as Leremember it. I don't think in 1926 the price of plaster had had any change made in it, but prior to that time I think it had been selling along for about \$10 a ton.

Q. Will you read the names and state now they were known to you?

A. Fairmont Wall Plaster Company. They were dealers in builders' supplies, located at Fairmont, West Virginia.

Q. Would you say they were jobbers or dealers?

A. They were dealers in some places, had retail yards; and at other places they did a jobbing business, they sold to other dealers.

Q. What is the next name?

A. Abbey—that is all it says here.

Q. What does that call to your mind?

A. Well, it is a common name, although I had a 1025 concern by that name located at Newark, New Jersey, which was also a dealer in builders' supplies. But I do not think they ran any retail yards, they sold wholesale.

Q. They were jobbers? A. They were jobbers.

Q. All right, what is the next name?

A. Toledo Plaster Company, it looks like.

Q. Do you know that concern?

A. They were a concern located at Toledo, Ohio, who operated what we termed a mixing plant that would take this calcined gypsum and mix the sand and other ingredients with it and put it onto the market. They were retail dealers, and had yards in Toledo. But I think that they, as I remember, sold their own plaster some places around wherever they could, outside of Toledo.

Q. Did they handle board for you?

A. Well, I have no recollection of seiling them any wall-board. We might have sold them some plasterboard, the small sizes, but I have no recollection of selling them wall-board. We might have, I don't remember it.

Q. How did you sell your plasterboard or wallboard to

them, on a jobber basis or how?

A. Yes, if it was for resale we allowed them, of course, a certain discount over and above the regular retail price.

Q. What is the next name?

1026 A. Cleveland Gypsum Company. That was a concern located at Cleveland, Ohio, and they operated a mixing plant, also, at Cleveland, and sold their products, which were the same as the Toledo Plaster. They bought calcined gypsum or stucco and mixed sand with it and sold it at retail. I don't know whether it was later or before this, but I think it was before this, the American Gypsum Company made a lease or a contract with the Cleveland

Q. Now my question, which is unanswered, is—what sort of a decline took place between 1926 and 1928, was it a gradual decline or otherwise?

A. As I remember it, the decline was more or

1018 less gradual, the drop wasn't all at once.

Q. Now you say here you are meeting your competition where you think it advisable. What comprised your chief competition on plaster prices?

A. Is that in this letter that you are talking about?

Q. You say there you were meeting competition where you thought it advisable. I want to know who you were

competing with?

A. Well, in meeting competition from some of the Grand Rapids, Michigan, plants, we refused to meet it, we did not recognize that certain mills in Grand Rapids produced a material equal to ours, and unless there was some specific reason for doing it we did not meet those quotations. In some cases we might do it if we had some particular reason, but to the dealer, our regular customers, we ignored those quotations.

Justice STEPHENS. What counsel asks you is—who were you competing with? Of course, it is proper to make a distinction that you weren't competing with the Michigan plants referred to, because you said they didn't make the same grade. But who were you competing with when you refer to competition in the third paragraph of this letter?

The WITNESS. Principally with the Grand Rapids mills, but whether the Certain-teed had—

## By Mr. STEFFEN.

1019 Q. (Interposing.) There is nothing in there to refresh your recollection?

A. No, but I am thinking about the date. Certain-teed had the Grand Rapids plants at this time, and it was principally Certain-teed that was making the lower price.

Mr. Steffen. We offer Government's Exhibit No. 170 in evidence.

Justice STEPHENS. Any objection?

Mr. BROMLEY. Only the usual one.

Justice Stephens. Received subject to the reservation concerning declarations of alleged co-conspirators.

(The letter referred to, marked as Government's Exhibit 170, was received in evidence.)

Justice Stephens. We will take our noon recess.

(Whereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m., of the same day.)

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#### AFTERNOON SESSION

Justice STEPHENS. Proceed, gentlemen.

Thereupon, FRANK J. GRISWOLD, the witness on the stand at the time of recess, resumed his testimony as follows:

Direct examination (resumed) by Mr. STEFFEN.

Q. I show you Government's Exhibit No. 171, which is D-86, which purports to be a letter from Mr. Kling to Mr. Avery under date of November 20, 1928, and I ask you to examine it and see if you can tell whether that is Mr. Kling's signature?

A. Yes, I would say that was Mr. Kling's signature.

Q. I now show you Government's Exhibit No. 172, which also purports to be a letter—this is, by the way, D-87—it purports to be a letter from Mr. Kling to Mr. Avery under date, this time, of February 7, 1929, and ask if you can identify Mr. Kling's signature?

A. Yes, I would say that that was Mr. Kling's signature. Q. I now show you Government's Exhibit No. 173, D-88, which purports to be a further letter from John A. Kling addressed to Mr. Avery, under date of February 13, 1929,

and ask if you can identify Mr. Kling's signature?

A. Yes, I would say that was Mr. Kling's signature.

Q. I now show you Government's Exhibit No. 174, which is D-91, which purports to be a letter from Mr. Kling, Chairman, addressed to Mr. S. L. Avery, under date of April 30, 1929, and ask if you can identify Mr. Kling's signature?

A. Yes, I would say that was Mr. Kling's signature.

Q. I now show you Government's Exhibit No. 175, D-92, which purports to be a letter from Mr. Kling, addressed to Mr. Avery, under date of May 1, 1929, and ask if you can identify Mr. Kling's signature?

A. Yes, I would say that was Mr. Kling's signature.

Q. I now show you Government's Exhibit No. 176, D-94, which purports to be a letter from Mr. Kling addressed to Mr. Avery, under date of June 7, 1929, and ask if you can identify Mr. Kling's signature?

A. Yes, I would say that was Mr. Kling's signature.

Q. I now show you Government's Exhibit No. 177, which purports to be a letter—that is D-99—which purports to

Mr. STEFFEN. And in view of Your Honors' decision the following morning, 101 and 102 would be automatically admitted?

Justice STEPHENS. I believe that is correct; 101 and 102 may be admitted, subject to the ruling of the Court with respect to declarations of co-conspirators.

(The documents referred to, marked as Government's

Exhibits 101 and 102, were received in evidence.)

Mr. Steffen. With Your Honors' permission, I would like to show the witness Government's Exhibit No. 137.

which was only imperfectly identified and was not 1030. admitted. I would like to show it to him again, and

call his attention to one or two matters and ask if he can at present identify it. I have no other such exhibit.

Justice STEPHENS. What number is that?

Mr. STEFFEN. D-43;

Justice STEPHENS. You may do so.

By Mr. STEFFEN.

Q. Mr. Griswold, I again call your attention to Government's Exhibit No. 137, which is a purported copy, unsigned, of a letter from you to the National Gypsum Company, under date of April 22, 1927, and I would ask you to read it again and to note the initials at the bottom, and state whether or not this is a copy of a letter which you may have signed and sent?

A. There is no mark on this letter that would refresh my mind, or evidence that I had seen the letter. I do not recall receiving this. If this letter is a copy, which it purports to be, I do not remember of receiving the claimed original. But the items that are touched on in the letter, I have a general recollection of some of the things that happened, but just how I got it or what from, I couldn't say.

Q. Will you state what items you have a recollection of,

which items?

A. Well, the last paragraph here, in which it 1031 says "I am authorized to discuss with you the troubles between your company and the Universal Gypsum Company", I remember that, as I testified. I don't know when it was now, but some time ago, that Mr. Holland, the Receiver for the Universal Gypsum Company, in talking with him, as I remember it, he told me it would be all right to discuss with Haggerty, if I saw him, their

Q. For how long a period?

A. I would say for 3 or 4 years.

Q. It was fairly stable at \$10 a ton prior to 1925 or 1926?

A. We would occasionally hear of lower prices being quoted by somebody that wanted a particular order on which there was a large tonnage, but the average price was \$10 a ton, as I remember it.

Q. State whether I am correct or not, but beginning in 1925 or 1926, it was around \$10 per ton; and as late as September, 1928, it had reached \$5. Was that a more or

less gradual decline, or what was the variation?

Justice STEPHENS. Before you answer that question. The Court is a little puzzled. The Court understood the witness to be talking in terms of bags. Does each bag of plaster weigh a ton?

By Mr. STEFFEN.

Q. Will you explain to the Court how plaster is put

up and sold?

1017 A. There were two ways of making shipments in wall plaster. One was in jute bags, which were returnable to us and redeemed by us at the price we charged, which was usually ten cents apiece. The other way was in shipping it in non-returnable paper bags. There was a difference in the quotations, usually, between in paper and in jute.

Justice STEPHENS. Now this figure of \$4 to \$6 a ton in Exhibit 170, the letter of September 22, that you testified to, referred to bag prices?

The WITNESS. I would like to amend that answer, I think this quotation did not include bags, because it doesn't mention whether paper or jute, and I think that was a bulk price, that is, if it had been paper it would have been \$1 more—

Justice STEPHENS (interposing). Bulk price per what unit, per bag or ton?

The WITNESS. Per ton; including bags. But this was a bulk price, as I-recollect it.

By Mr. STEFFEN.

Q. Now the similar bulk price per ton for plaster in 1925 or 1926 was about \$10?

A. Those prices included paper bags, as I remember.

Gypsum Company, which was headed by John A. Kling, and we leased those plants and afterwards we operated those plants ourselves at Cleveland, Ohic, the American Gypsum Company operated them.

Q. Is there any other name on there?

A. There is one other, Wyman Allen, I think it is, Company at Boston, and that was a lumber company, as I remember it, located at Boston, Massachusetts, to whom we sold some wallboard. I don't remember of ever doing a very extensive business, but we did sell them some wallboard. I remember that.

Q. Did you sell them as dealers or jobbers?

A. We sold them as jobbers, allowed them a discount.

Justice Stephens. I didn't quite understand about the previous company, the Cleveland company. Did you say you sold them as dealers or jobbers?

The WITNESS. To the best of my recollection we sold them nothing but this stucco, which they made their wall plaster out of.

# By Mr. STEFFEN.

Q. Did you sell them stucco as jobbers or as dealers?
A. No, not as jobbers. We sold them at a price that we

A. No, not as jobbers. We sold them at a price that we had to such concerns over the country. We, of course, made a manufacturing concern like that a little better price. Well, ordinarily the stucco wasn't sold to builders' supply dealers, they didn't handle it at all, it had to be in some other-form before they would handle it.

Q. I now show you Government's Exhibit No. 183, which is D-108, and which purports to be a copy of the Minutes of the Board of Directors of the American Gypsum Company under date of April 1, 1929, and ask if you can identify the signatures of the Chairman and the Secretary?

A. Yes.

Q. What are they?

A. It is signed by John A. Kling; Chairman; J. B. Davis, Secretary.

Justice GARRETT. Pardon me a moment. Do I understand that you had retired from the American Gypsum Company at that date?

The WITNESS. Yes, Your Honor, February 1, 1929, I retired. I only identified these signatures, I did not attend that meeting.

Justice GARRETT. I understood that, but I wanted to be clear on that other matter.

Mr. Steffen. I am only interested, Your Honor, in the second paragraph on the second page of Exhibit No. 183.

Justice STEPHENS, I see.

Mr. Steffen. And the third paragraph. In fact, I am not interested at all in the second paragraph, it should have been the third paragraph.

Justice STEPHENS. This is Exhibit No. 183?

Mr. STEFFEN. Yes, sir.

I now move the admission of Exhibits—or offer in evidence Exhibits Nos. 171 to 183, inclusive.

Justice STEPHENS. Is there any objection except the usual objection?

Mr. BROMLEY. That is all, sir.

Justice STEPHENS. They are received in evidence subject to the Court's reservation with respect to the declarations of co-conspirators. And an objection by Mr. Adams may be noted that they are not identified.

Mr. ADAMS. Thank you, Your Honor.

Justice STEPHENS. The Court ruling that they are identified by signature and circumstantially by their relation to each other.

(The documents referred to, marked as Government's Exhibits 171 to 183, inclusive, were received in evidence.)

Justice STEPHENS. For the sake of the record, are you introducing in evidence, although you are only interested in the third paragraph of Exhibit 183, the entire exhibit? I suppose you will have to introduce the whole exhibit to make that exhibit explanatory.

Mr. STEFFEN. That is right.

Justice Stephens. Your reliance, the record may show, is on the third paragraph of the second page.

Mr. STEFFEN. That is right.

I believe, Your Honor, that Exhibits 101 and 102 were at first admitted, and then at the close of the session—

Justice Stephens (interposing). There was a reservation in order to allow objection with respect to declaration, I believe. be a letter from Mr. Kling to Mr. Avery, under date of September 18, 1929, and ask if you can identify that letter as bearing Mr. Kling's signature?

A. Yes, I would say that that was Mr. Kling's signature.

Q. I now show you Government's Exhibit No. 178, D-100, which purports to be a letter from Mr. Kling to Mr. 1023

Avery, under date of October 14, 1929, and ask if

you can identify Mr. Kling's signature? A. Yes, I would say that was his signature.

Q. I now show you Government's Exhibit No. 179, D-101, which purports to be a letter from Mr. Kling to Mr. Avery, under date of October 18, 1929, and ask if you can identify the signature?

A. Yes, I would say that was his signature.

Q. I now show you Government's Exhibit No. 180, D-81, which purports to be a reply by Mr. Avery to Mr. Kling, under date of October 22; 1929, and ask if you can identify Mr. Avery's signature?

A. Yes, I would say that was Mr. Avery's signature.

Q. I now show you Government's Exhibit No. 181, D-102, which purports to be a letter from Mr. Kling in longhand, addressed to Mr. Avery, under date of November 12, 1929, and ask if you can identify Mr. Kling's signature on the back of that, or his handwriting?

A. I would say that was his signature, but the letter itself, I wasn't familiar enough with his writing in regular correspondence, because I seldom saw it, but his signature

I was familiar with.

Q. I now show you Government's Exhibit No. 182, D-82, which purports to be a reply from Mr. Avery to Mr. Kling,

under date of November 16, 1929, and I ask if you can identify Mr. Avery's signature to that letter?

A. Yes, I would say that was Mr. Avery's signature.

Q. I now show you-

Justice STEPHENS (interposing). Let us read this. This is quite a long letter, Mr. Steffen.

Mr. Steffen. Very well.

Justice Stephens. Thank you. Go ahead, Mr. Steffen.

By Mr. STEFFEN.

Q. I call your attention to the second page of Government's Exhibit No. 182, and ask if you know what that writing means in the margin?

A. I don't know whose writing it is. The names men-

tioned there were people that were known to me.

from this time on, and I recommended to our Directors

that they accept his proposition.

Q. Isn't it a fact that right from the beginning Mr. Avery's position was that the American Company, in order to settle and get a license, would have to acknowledge the validity of his patents, pay damages, agree to pay a royalty, and permit him to fix their prices?

A. I would say yes, that was his position.
Q. And wasn't that his position at all times subsequent to that time, at least until you got out of the industry?

A. So far as I remember, yes.

Q. And isn't it the fact, sir, that if your Directors had been willing, your company could have had a license on those terms at any time during the period from 1926 until you left the industry?

A. At any time after we had reached the \$50,000 as the amount of the past infringement, any time after that, as I remember it, we could have taken out a license. But my

own directors refused to do it.

Q. Well, at any time prior to the date when you reached the agreement on the \$50,000, you could have taken out a license subject to your ability to get together on a

proper figures for the damages, couldn't you?

A. As far as I remember, yes.

Q. Now while we are on the subject of this \$50,000, which is referred to in Exhibit 161, that agreement which you made with Mr. Avery, referred to in the letter, Exhibit 161, which is dated June 2, 1927-

Justice Stephens (interposing). Can you give us the "D" number of that?

Mr. PAUL. D-40.

Justice STEPHENS. Proceed.

By Mr. BROMLEY.

Q. The arrangement which is referred to in that letter, Exhibit 161, is one which you made with Mr. Avery, you acting on behalf of the new merged company, should it

ever come into existence; isn't that right, sir?

A. Well, it was for the benefit of the new company, or the merger, because as has been brought out before, up to that time there was no amount fixed for past infringement claimed by Mr. Avery that we could set up as a liability in our financial plans, and this was the first time that there had been any amount fixed on. And after it was settled, we, of course, know what the amount was to be, and also the

Cross examination by Mr. BROMLEY.

Q. Mr. Griswold, it was sometime in 1927 that Mr. Holland of the Universal Company authorized you to talk to Haggerty of the National Company, was it not?

A. Well, I can not state the date without something it was somewhere around that time, but I don't remember

the exact date.

Q. Will you look at Exhibit 137 for Identification, and tell me whether it wasn't in 1927 that Holland authorized you to talk to Haggerty?

A. Yes, prior to April 22, 1927.

Q. Now isn't it a fact that Mr. Holland didn't come with the Universal Company until 1928?

A. Well, I could not say, sir, as to the date.

Q. Don't you remember that if you were given this authorization in 1927, you were given it by some other person connected with Universal than Mr. Holland?

A. That is barely possible, but my recollection was that Mr. Holland was the one, because he has been injected into this picture. But prior to that, I think Mr. Shearer was

there. I am not clear on that, though.

Q. Look at the second paragraph of Exhibit 137 for Identification, and see if that doesn't refresh your recollection that it was Mr. Palmer who was the President of Universal at this time?

A. You are correct, it was, and it so states in this letter

that it was Mr. Palmer.

Q. Now having looked at that paragraph, is your recollection refreshed so that you can now say that it was Palmer who authorized you to take up with Haggerty the troubles between Universal and National?

A. Yes, I would say that is correct, because the letter

so states.

Q. In connection with your testimony about that, I would like to have you bring out just what the nature of the trouble was between Universal and National, and for that purpose let me ask you this: It is a fact, isn't it, that at this time, in 1927, the Universal Company owned the Haggerty patent?

A. I believe that is correct.

Q. And the Haggerty patent covered the use of starch in the manufacture of board, whether used for purposes of getting a better bond between the paper and the core, or used to make a lighter weight board; isn't that so?

A. Yes.

Q. And the National Company, in 1927, it had been discovered by Universal, had been infringing that patent and using starch for one or both of those purposes; isn't that so?

A. I remember they had some trouble-

Mr. STEFFEN (interposing). I think I would object to that as calling for a conclusion.

Mr. Bromley. Isn't that what you were told by 1035 Mr. Palmer, that that was the nature of the trouble, that the National Company was infringing the Universal's starch patent?

Justice STEPHENS. Just a moment. I think technically the previous question did ask for a conclusion.

Mr. BROMLEY, I withdraw it.

Justice STEPHENS. But the present question, I think, is proper.

Mr. BROMLEY. Will you read the present question? (The question was read by the reporter.)

The WITNESS. My recollection of the matter is that it was a dispute between them over the use of starch or dextrin. Some one or the other claimed the patent, but it is too far back and I don't remember the details.

By Mr. BROMLEY.

Q. But do you remember that at this time a lawsuit had been started by Universal against National in the Federal District Court in Buffalo, New York?

A. No, I can't say that I remember that. If I heard about it, it probably didn't register on my mind. I don't

remember, Mr. Bromley.

Q. Do you remember that at this time, that is, April 22, 1927, a Federal judge, whose name was Hazel, had decided in Buffalo that the starch patent was valid and had been infringed by National?

A. In some manner, yes, I remember hearing of that case, but I had nothing to do with it and I had gotten the information from somebody else. I knew

that much about.

Q. Look at the next to the last paragraph in Exhibit 137 for Identification.

Justice STEPHENS. Is that the one commencing "I am authorized to discuss with you"?

Mr. BROMLEY. Yes, sir.

Q. Yes, but Mr. Avery at all times said, "You have got to take a license under all of these patents if you take any," and that was one of the points of dispute between you; you wanted the 3-year and he wanted the one that lasted

for many years; isn't that right?

A. Later on that was his position. I am speaking about the negotiations when they first started, that they only had to do, as I remember it, with the Utzman type edge and the Clark or Birdsey type edges, and possibly their formulas and so forth, that if we were to pay a license or royalty for the use of a patent, we were entitled to the benefits of their experience in making that product.

Q. Well, at any rate, it soon came to be Mr. 1044 Avery's position that you must take a long-term contract if you wanted any?

A. Yes, later on he stated a term which was longer than what was at one time discussed.

Q. And he never receded from that position or offered you

any concessions in that regard, did he?

A. After he had stated the term, that is, what you term the long-term period, I do not remember of him ever mak-

ing any change in it.

Q. Now this Mr. McCrady, to whom you wrote some of the letters which have been received in evidence, he was one of your fellow directors, was he not, who was opposed to taking a license from USG?

A. Yes, Mr. McCrady was opposed to taking a license

agreement.

Q. And it is a fact that the majority of your fellow directors were opposed at all times while you were with the company?

A. Yes, the majority was. Otherwise it would probably

have gone into effect.

Q. And McCrady and the others who were opposed, objected not only to having to pay damages, but also objected to having to pay royalties and also objected to having their prices fixed by USG, did they not?

They objected to paying damages if we could help it. If they had to pay a royalty at all, of course they wanted to get it as low as possible. But they were opposed to the proposition as was outlined at that time.

Q. Well, they were opposed to all of it, weren't they?

A. Well, I couldn't remember at this time whether they were opposed to all of it or not, but I remember they were opposed to the damages and to the amount of the royalty at that time.

troubles. I had expressed myself that I didn't want to dip into an argument between them, I had nothing to do with it; and that is what I meant when I said that there would be no objection to me discussing it with him, with Mr. Haggerty.

Q. Did you discuss it with Mr. Haggerty?

A. Well, I couldn't say at this time. I suppose I did, but it is too far back.

Mr. FINCK. I move to strike, if the Court please, that he "supposed" he did. He says he doesn't recall the letter, doesn't know anything about it, and I move that the answer be stricken.

Justice STEPHENS. It seems to the Court that the entire answer ought not be stricken. The letter isn't now being offered and he isn't assuming to say anything about the letter. He is stating that he was authorized to talk in respect to some troubles between Universal and National. The statement that he "supposed", that particular statement, may go out.

Mr. STEFFEN. I now offer the letter only as respects the last paragraph, which the witness has identified.

Justice STEPHENS. Let me read the ruling of the Court before on this

We don't see how the matter presented is in any different light than it was when originally ruled upon, at which time the exhibit was excluded for lack of identification. Of course, the witness has now testified, his recollection apparently being refreshed, that he was authorized by someone to intervene between Universal and National, and that statement may stay in the record, because that is apparently from his own recollection, and the letter itself is usable to refresh his recollection. It has been examined by the Court as a basis to refresh his recollection. But unless you have something new to urge, it doesn't seem to us that the letter itself is admissible.

Mr. Steffen. We have no further questions at the moment, and the defense may cross-examine the witness.

Justice Stephens. The exhibit itself is not received in evidence, but the statement of the witness as to his own recollection does remain in the record.

You may cross-examine.

American Gypsum Company knew what they would either have to pay or else the new company would have to pay, so it would be passed along to the new company, or-

dinarily.

1040 Q. Inoticed, Mr. Griswold, that in Exhibit 160-A. which was your Board of Directors minutes for June 22, 1927, it appears that you did not submit this offer to the American Board of Directors. Now the reason you didn't submit it was because it was an offer which was for the benefit of the new merged company should it ever come into existence, isn't that right?

A. Well, I wouldn't say that was the reason why it was

not submitted to the directors.

Q. What was the reason that it wasn't submitted to your

American directors?

A. The directors, I am very sure, were familiar with it, that I told our own directors of the proposition and recommended that they take out a license.

Q. Well, what was their reaction, if any, to the offer?

Did they turn it down or were they favorable to it?

A. They turned it down.

Q: I see. So your present recollection is that you did submit the \$50,000 offer to your American directors, and they refused the offer?

A. They refused to accept the offer that he had made.

Q. Now Mr. Avery had no interest of any kind in your merger plans, did he? A. No.

Q. He was not to participate nor was USG to par-1041 ticipate in any form, shape or manner?

A. No. Q. Isn't it a fact, Mr. Griswold, that when you wrote to Avery, or talked to Avery, during this 1926 to 1929 period, that generally speaking you were trying to get from Avery concessions for the benefit of your company in the taking of a license under the USG patents?

A. Trying to get concessions?
Q. Yes.
A. Yes, I was trying to get as low an amount for past infringement damages, of course, and as low a royalty to govern the future manufacturing, as I could. I don't remember the exact details.

Q. Well, you hoped that if you could get Avery down low enough on damages, that you could induce your fellow.

directors to take a license, didn't you?

A. As I remember it, at that time Mr. Avery's demands for royalties were rather high, we thought, and I was trying

to get them down because some of the different companies objected, including our own company, objected to the amount of royalties that he was asking.

Q. So that you were trying, over these years, to induce Mr. Avery to be more lenient in his offer than he was being,

weren't you?/

A. I would say yes,

1042 Q. And one of the ways in which you sought to induce Mr. Avery to be lenient with you was to give him the idea that you were promoting his interest and the position of USG in the industry, isn't that right?

A. I don't get that question.

Mr. STEFFEN. I object to the form of the question.

Justice STEPHENS. Read the question.

Mr. BROMLEY. He didn't get it, so I withdraw it.

By Mr. BROMLEY.

Q. Didn't you seek to give Avery the impression that you were trying to help him out and his company out in its negotiations with other prospective licensees?

A. Well, I would say yes, at times I argued that way,

that it would react to his benefit.

Q. Now the fact is that while Mr. Avery always met and talked to you, and you were friendly most of the time, he never at any time offered you any concessions by way of

settlement or license terms, did he?

A. For past infringements he never made any other one than the \$50,000, that was the only price he ever named. And on royalties which we were to pay in the future if we used the Utzman patent, after this 5 percent on the selling price was mentioned, which amounted at that time, with the price at \$30, to \$1.50 a thousand square feet, I have no

recollection of that price every being changed after-

1043. wards, he always stood on that price.

Q. And he always stood on the proposition that you must recognize the validity of his patents, and take licenses under all of his patents, and that the license agree-

ment must run at least until 1937, didn't he?

A. Well, at the beginning of my neg iations, the only patents we were discussing were these wallboard edges, that is, the Utzman type edge and later on the Birdsey type, which conflicted with the Clark type that we were making. Those were the only two that I remember especially at first, because we weren't interested in anything else particularly at that time.

## By Mr. BROMLEY.

Q. Doesn't that refresh your recollection that there was litigation pending between the two companies at this time?

A. Yes, to this extent, that there was trouble of some kind. Whether there was an actual case in court, I could

not say, at this time.

Q. Now as to that trouble, Mr. Griswold, you knew then, and it is the fact, is it not, that USG was not concerned in any way?

A. As far as I remember it, no, they were not concerned

in that.

Q. And the efforts which you undertook in regard to this trouble between Universal and National were merely for the purpose of trying to get rid of what you thought were disruptive or disturbing conditions in the industry, is that right?

A. That is correct, as I remember it, because I wasn't interested in their troubles except to try to smooth them out if I could.

Q. You had no other interest in attempting to smooth them out except you thought litigation of any sort in the industry was a bad thing for the industry, and thereby affected your company and your proposed merger adversely; isn't that right?

A. That is right.

Q. Now, sir, you teld us, did you not, that you were offered a license for the American Company by Mr. Avery as early as 1926?

A. That I was what?

Q. That Mr. Avery offered you, on behalf of the Ameri-

can Company, a license as early as 1926?

A. I remember we were attempting to get a settlement with him and did, as has been brought out in the testimony here, get a proposition whereby \$50,000 was paid to settle claims for past infringement.

Q. Well, isn't it a fact, Mr. Griswold, that at all times from 1926, at least, until you left the industry, Mr. Avery's position with respect to American and a license was always

substantially the same position?

A. Yes, and I just remember now that he certainly did make an offer for a license, because I recommended to our stockholders, when he made this proposition, that

to do away with the litigation and settle it. Inasmuch as he had fixed the amount on the past damages up to that time, it was only a question of the royalty we were to pay

A. My recollection is that it had a strong resemblance

to what you have in your hand.

Q. Are you able to tell us that it was on or about March, 5, 1925, that Sidney C. Clark appealed to the Court of Appeals in the District of Columbia in the interference proceeding which had been won in the Patent Office by Birdsey prior to that time?

A. Yes, I remember there was an interference suit

started.

1053 Q. Well, can you verify this date as on or about March 5, 1925, that Clark appealed to the Court of Appeals in the District of Columbia?

A. I cannot identify the date, I don't remember, but I

remember that the case was appealed.

Mr. Bromley. Will you stipulate, Mr. Steffen, that it was on March 5, 1925, that Clark appealed to the Court of Appeals in the District from the decision of the Commissioner of Patents, awarding priority of invention to Charles R. Birdsey?

Mr. Steffen. May I see that, please?

Mr. BROMLEY. Yes.

(After examining record on appeal.)

Mr. Steffen: I think we will so stipulate. We would like to have access to this record, if he is not proposing to put it in evidence.

Mr. BROMLEY. I am not.

Mr. STEFFEN. We would like to have access to it.

Justice Garrett. That is not an action under 4915, that is just a direct appeal from the Commissioner to the Court of Appeals under another section?

Mr. Bromley. Under sections 4912 and 4913.

Justice STEPHENS. At that time the Court of Appeals of the District had appellate powers over the Patent Office, and direct appeals were not taken; as they are now taken, to

the Court of Customs and Patent Appeals. The 4915 jurisdiction came later. It existed at the same time.

but that appellate jurisdiction was taken away. At

that time I think they had it.

Your stipulation may be recorded, and you may have access through the courtesy of counsel to this record, I assume.

favor of the license agreement, and I wanted to use this Utzman type edge.

Q. And you thought that he should have been in

favor of it, didn't you?

A. Well, I think I thought that, but that didn't change him over, he had a mind of his own.

Q. But you tried to change him over?

A. I possibly might have argued and tried to change him, yes.

Q. And you tried to change him over when you wrote

these letters to him, didn't you?

A. Well, wherever they show some argument, I would

say yes.

Q. In some of them you use the word "agreed", that you had gone around and seen some of these competitors and that they had "agreed" to do something. Will you tell us what the fact was? Was there any agreement at any time that you knew of, between American and USG, or American and any other company, that they or anybody else would do anything with respect to taking or not taking these licenses?

A. As the word "agred" is usually used, I would say there was no such—it should not have been used in connection with these meetings such as are mentioned in the letters. All it was was an effort on my part to induce or convince these other manufacturers, practically all of whom

were friends of mine, having built their plants and 1048 having consulted with them in their problems in

the gypsum business, to convince them that it would be to their interest in the long run, individually, to instead of trying to manufacture an open-edge type board and trying to put it on the market against a product such as the United States Gypsum Company were making, on which they claimed a patent, that they would find it a very difficult proposition to do so and market it at a price that would make them any money, and in my judgment, knowing what I did about the manufacture of board, the best thing for them to do would be to not try to antagonize the United States Gypsum Company by making a closed-edge board, because it meant an experience just like we were having, they would be up against litigation, and that the sensible thing for them to do in my judgment, was to take out a license which would permit them to manufacture the Utzman type or closed-edge type board.

And in some of them I used the word "agreed", but some of them I probably convinced, what I meant by that, that

they thought probably that would be the wise thing to do. But as to there being any agreement as to what we should do, I never made an agreement with anybody else as to what we should do, an agreement that was binding. It was simply in a conversation in which you might say that I convinced them that that was the thing to do.

Q. During any of this period did you act as agent or

emissary of Mr. Avery?

1049 A. No, I did not.

Q. Did you have any agreement or understanding with him that you were going out to act for him?

A. Not for Mr. Avery or for the United States Gypsum

Company.

Q. Did you have any agreement with Mr. Blagden, or anyone else, that you were going out and act for him or anyone else?

A. No, I did not. As I remember it, I had never met Mr. Blagden until that first meeting, May 12, I think it was,

the date mentioned in the correspondence.

1050 Justice STEPHENS. Which was Mr. Blagden's com-

pany?

Mr. BROMLEY. The Beaver.

By Mr. BROMLEY.

Q. Now, at any time, did Mr. Avery ever tell you to go out and act for him in inducing other companies to take a license from him?

A. No, he did not.

Q. And it is a fact, isn't it, Mr. Griswold, that at all these times you were acting solely for your own company, the American Gypsum Company, or on behalf of your con-

templated merger?

A. Yes, I was acting to settle the disputes and litigation between our companies, and I was vitally interested in getting this thing settled on account of the new merger which was taking in a new number of these companies that would be involved in litigation if they tried to make anything except on open-edge board.

Q. You told the Court the other day that some time in 1920, as you recalled it, in a discussion with Mr. Avery, Mr. Avery had claimed \$8 as an amount of money that he was seeking to recover from Best Wall on the basis of a thousand square feet of board. Now, as you recall it, was that \$8 per thousand square feet of board the way Mr. Avery stated his damage claim on account of the Best Wall infringement?

Gypsum Company; and Mr. Blagden, whom I am sure I had not met, was the new general manager of the Beaver Board Company, and I was anxious to meet him and get the details of what he knew, or if the decision had been rendered, I wanted to get information as to what it was, because I was vitally interested in that decision. It was the first time that I had heard of it, that it had been rendered.

By Mr. Bromley.

Q. Isn't one of the reasons that you went to see Mr. Blagden to be found in the fact that the Court of Appeals

had decided against you in February, 1926?

A. Yes, I saw, as I testified earlier, that if this decision was final, and we couldn't get anything else, we were up against it, not only the American Gypsum Company, but the merger that I had in mind; the different companies that

I was trying to get in this merger would be up against the same difficulty. They either had to take

out a license or make an open type board.

Q. And when you met Mr. Blagden, you asked him how. the Beaver Company was handling the litigation with USG, did you not?

A. I don't remember that I asked him just that, but I would say I did, because that was my purpose in meeting

Q. You wanted to find out the precise status of the litigation, and any settlement negotiations, if there were any, did you not?

A. I did. Q. Prior to the time you had this talk with Mr. Blagden in May, 1926, you hadn't had any negotiations or discussions with USG, either about a settlement or a license, had you?

A. Prior to this date?

Q. Prior to this time in May, 1926, when you went to

Buffalo and talked to Blagden.

A. As I remember it, I had not had any talks with Mr. Avery, and that was another reason, if I was going to talk with him, I particularly wanted to hear what Mr. Blagden had to say for his company before I talked to Mr. Avery.

Q. And the fact is that you had never discussed the subject of settlement or license with anyone up to that time except that in 1920, when you first started to make board, you said that you went to Chicago and asked Avery about a license; but except for that incident in 1920.

you had never talked to anyone about settlement of your troubles, or taking a license from USG, had

you?

Q. Well, do you remember in Exhibit 117, that Mr. Mc-Crady wrote to Mr. Davis under date of September 20, 1926.—

Justice Garrett (interposing). Do you have the "D" number there, Mr. Bromley?

Mr. BROMLEY. D-19.

Justice GARRETT. Thank you, that will aid us.

By Mr. BROMLEY.

Q. (continuing)—and stated that Mr. Avery had given them to understand that for the next 10 years American would have to eat out of his hand? Do you see that reference in the middle of the second paragraph?

A. I remember seeing this letter before.

Q. Isn't that a reference to McCrady's position as you knew it, that if you signed a license and gave USG the right to charge royalties and fix prices, that your company would have to eat out of USG's hand for as long as the license lasted?

1046 A. I would say that that is what he had reference

to in that statement he makes here.

Q. By the way, these letters that you wrote to McCrady from time to time, which have been received here in evidence, you wrote for the purpose of attempting to induce him to change his views on this matter, didn't you?

A. Well, I presume I did. But Mr. McCrady, during a considerable part of this time, was on the committee to adjust, with me and Mr. Davis, to try and settle this litigation between ourselves and the United States Gypsum

Company.

Q. But one of the purposes in writing letters to him was to get him, if you could, to change his attitude on the subject and agree with you that a license should be signed,

wasn't it?

A. Well, I don't think I probably missed many opportunities to do that, but it was my duty to report to him, he was president of the company, and I probably had some meetings that he hadn't attended, so I was reporting to him what had transpired to keep him posted on the matter up to that time.

Q. And at the same time you were doing a little arguing to make it seem as attractive to him as you could, weren't

you, Mr. Griswold?

A. Yes, I never changed my position. I was always in

Mr. BROMLEY. Certainly.

By Mr. BROMLEY.

Q. Now, it was sometime after this appeal to the Court of Appeals, which we have agreed occurred in March, 1925, that USG commenced two patent infringements against your company in the Federal Court for the Northern District of Ohio, isn't that right?

A. At about that time they started those suits.

Mr. BROMLEY. Will you stipulate, Mr. Steffen, that the suits were started on September 22, 1925? I am handing you the record on appeal to the C.C.A., from Judge Jones' opinion which was rendered in 1928.

Mr. Steffen. We will stipulate simply that one suit was started on September 22, 1925, and that was the suit brought on the Birdsey patent, No. 1,358,508. We also would like to have access to the record I just looked at.

Justice STEPHENS. That may be understood; the stipulation is recorded.

By Mr. BROMLEY.

Q. Now, Mr. Griswold, can you tell us that it was on February 1, 1926, that the Court Appeals of the 1055 District of Columbia affirmed the decision of the Patent Office in the interference proceedings between Clark and Birdsey, which resulted in final priority being awarded to Birdsey?

A. I remember such a decision, I don't/remember the

date.

Mr. Bromley. Will you stipulate, Mr. Steffen, that it was on the 1st of February, 1926, that the Court of Appeals affirmed the decision of the Commissioner of Patents, awarding priority of invention on the subject-matter of the interference, to Birdsey?

Mr. STEFFEN. May we take a few minutes' recess, your Honor?

Justice STEPHENS. Yes, the Court will be in recess for five minutes.

(Thereupon, a short recess was taken, after which the trial was resumed.)

Mr. Steffen. I may say, your Honor, that we are very glad to stipulate that the Court of Appeals affirmed the decision of the Commissioner of Patents, awarding priority of invention to Birdsey, on the 1st day of February,

1926, subject to our being permitted to check the date more carefully, and subject further to being given access to the record on appeal.

Justice STEPHENS. That may be agreed.

Mr. Steffen. My stipulation covered both date and fact of the awa.d.

Justice STEPHENS. Yes, the record may so show.

By Mr. BROMLEY.

Q. Now, it was following this action of the final court in the Birdsey-Clark interference, that you first realized the necessity of getting a license from USG, or making some arrangements with USG, isn't that right?

A. Yes. So far as the success of my merger that I had in mind was concerned, I realized after the court's decision had gone against us, that it was necessary that we settle that litigation, and the only way to do it that I could see was by taking out a license agreement.

Q. Up to this time your chief hope in this situation had been that Clark would be awarded priority over Birdsey,

isn't that right?

A. Yes.

Q. And if that happened, then you would have had a type of semi-closed edge, which you could have made free from any claim of infringement by USG?

A. Yes, we could continue to make the edge we had

been making, if that court did not decide against us.

Q. But when the Court of Appeals went against you, then there was nothing that you could do except try to make your peace with USG so far as that edge was concerned, wasn't that true?

A. Either that, or make an open-edge board, which we

did not want to do.

Q. Yes. And isn't that the reason why you took 1057 occasion to talk to Mr. Blagden at the time mentioned in Exhibit 104, which is your letter to McCrady of May 12, 1926?

A. Will you restate the question, please?

Mr. Bromley. Will you read the question, Mr. Reporter? (Whereupon, the pending question was read by the reporter.)

The WITNESS. The information I had was to the effect that some decision had been made or was about to be made in the case between the old Best Wall people, which had been assumed by the Beaver Board Company, and U. S.

A. I think, as I remember it, that \$8 a thousand 1051 settled damage claims and everything for the board that they had made up until a certain time, I don't remember the date, but he figured, as near as I can remember, that it was around \$8 a thousand square feet for damages. That probably included profits. I think he had it high enough. Anyway, that is what I recollect was the figure that he set.

Q. Well, that claim of \$8 per thousand included damages to USG and the profits which Best Wall had made out

of the infringement, isn't that the way he put it?

A. Yes, on the claimed infringement. It wasn't settled at that time, I don't think, but it was later on.

Q. Well, the point I wanted to make clear—Mr. Avery didn't ask you for a royalty of \$8 a thousand feet, did he?

A. No, I don't think we ever got down to that. As I remember, Mr. Avery wasn't very anxious to talk about it, he didn't want to jeopardize his position in the other suit he had against Best Wall Company, and he wasn't anxious about talking license because I think that he realized that anything like that was entirely too high, but he didn't want to state any other figures probably at that time, on account of this litigation with the Best Wall Company which he had.

Q. Because if he stated some lower figure to you, that might be used against him in his claim against Best Wall,

is that it?

A. That was his position, and if he made me any 1052 lower price than that, it would react against him because no court would allow him more for past infringements or damages than the royalties that he offered

for the future rights to manufacture, and he didn't want

to jeopardize his suit by making it a lower price.

Q. Now, you have talked, on your direct examination, about the interference proceedings which lasted for so many years between the Birdsey patent and the Clark application. Do you recognize what I hold in my hand, by the way, as a printed record in that interference proceeding?

A. Well, I don't recognize it, but I presume that is what

it is.

Q. Did you ever see the printed record that went up to the Court of Appeals of the District of Columbia in that interference?

A. I think I did at one time, yes.

Q. Was it about as thick as what I hold in my hand, some three inches?

Q. This letter you wrote in 1926, didn't you?

A. Yes.

Q. And if you thought the Birdsey patent had issued in 1920, and had twenty years to run, it was just fourteen years from 1926 to 1940, wasn't it?

A. Yes.

Q. Now, isn't that what you had in mind when you referred to the possibility of holding the price steady on

wallboard for the next fourteen or fifteen years?

A. Yes, I figured that if the different parties took out a license agreement with the United States Gypsum Company, and the law gave them the right to establish the price at which the licensee could sell the product, that the price on wallboard would remain fairly stationary unless it was disturbed by competition of other products. There were a number of other products on the market in competition with wallboard at that time, as I remember it,

Q. And you thought that because at the time that you wrote this letter, Exhibit 104, you thought that USG was going to fix the prices under the Birdsey patent, isn't that

right?

A. Well, I assumed so. We understood they had the

right to do it.

Q. Now, you did not mean by this last sentence to which I have just directed your attention, to tell McCrady that you had any understanding with Avery or anybody else that price control would be extended under some patent, after the expiration of the Utzman patent?

A. No.

Q. You never had any discussion with Mr. Avery or anyone else about his finding some patent other than the Utzman patent, to give a longer price control, did you?

A. No, my understanding was that the price control

ended at the expiration of the patent.

Q. Now, will you look at Exhibit 106, which is your letter of June 2, 1926, to Mr. Avery, and particularly the

fourth paragraph, Mr. Griswold?

At this time, that is, in June, 1926, the Beaver Company was proceeding with its settlement and license negotiations with USG without any regard to what other manufacturers were doing so far as you knew, isn't that right?

A. That is right.

Q. And you had nothing whatsoever to do with the negotiations between the Beaver Company and USG, did you?

A. I did not.

Mr. Steffen. Yes, I will; I think the witness has so testified in general.

Justice Stephens. That stipulation may be recorded.

By Mr. BROMLEY.

Q. You have told the Court that you took legal advice back in this period as to the right of a patent owner to fix prices. Were you advised, Mr. Griswold, that that

right, that is, the right to fix the price of a patented article, only extended to the first sale, that is, sale by the licensee to the dealer, and did not extend to any subsequent sales?

A. Yes, I was.

Q. At any time in any discussion with Mr. Avery, on settlement or license, did he ever mention to you what price it was that he had in mind fixing if you took a license?

A. Not that I remember of.

Q. And on the contrary it is a fact, isn't it, that he told you several times that his decision was that that right must be exercised by USG alone, and that he would not have any discussion with anybody, or permit any discussion, as to what that price would be?

A. That is correct, as I remember it.

Q. And wasn't that one of the difficulties that you had in convincing your fellow Directors, that is to say, that you were not able to give them any assurance as to what Avery would do about prices, assuming that you took a license which gave him the right to fix them?

A. Yes, our Directors were a little bit—I don't know what to call it, probably suspicious. There had been a quite a lot of controversy and ill feeling in the industry, and when Mr. Avery demanded the right to reserve unto himself the right to establish the price, which according to law

he had the right to do as we understood it, under his license, it would be possible for him, without any

protection in that written contract or license agreement, for him to put any price that he cared to into effect, and if he wanted to make it expensive for some of the licensees, he might put in a very low price, he might put a very low price into effect, and some of them brought up these points, it was open, it was up to him entirely, that they had nothing to say about it.

Q. So that what your Directors were afraid of is that if Mr. Avery got the right to fix the prices, he might fix the price so low that the royalty you had to pay of \$1.50 at a \$30 price, might become extremely burdensome on you and make the difference between profit and loss, is that right?

A. That is what they had in mind.

Q. In other words, if he fixed the price so low that the margin of profit was only a dollar above cost, and you had to pay a royalty of \$1.50, that would result in your doing business as a loss, wouldn't it?

A. Yes.

Q. While Mr. Avery, not having to pay a royalty, could still make a small profit at that price?

A. That is correct.

Q. Now, did you ever take this matter up with Avery and have any discussion with him after your Directors suggested the possibility of the price being made so low that it would harm American?

1063 A. Yes, I would say that I did.

Q. I will come to them specifically later, but that is the meaning of these references in some of these letters to assurances that Mr. Avery gave you which he would not put in the contract, is it?

A. State that again, Mr. Bromley.

Q. I will withdraw it.

During some of your discussions with Mr. Avery, did he assure you that if he fixed the price so low that it hurt you, he would make some adjustment in the royalty rate so that you wouldn't be caused to suffer a loss?

A. Yes, he did.

Q. And did he also, however, refuse to put that in the license contract?

A. Yes, he refused.

Q. And are there some references in your letters to Mc-Crady and others about that subject?.

A. As I remember it, there are, yes, in some of the

letters.

Q. Now, was there ever anything said by Mr. Avery at any time that you ever had a talk with him, directly or indirectly, that his control of prices that he wanted to get through the license agreement with you, would extend to anything but the first sale of the patented article?

A. No.

Q. And did you ever at any time have any discussion with Mr. Avery as to what the prices for plaster or block or tile should or should not be?

A. You mean in connection with the license agreement

or anything else?

Q. Yes.

A. Absolutely no connection with the license agreement. I might have expressed myself at some time as to what I

A. Yes, that was an American Gypsum Company matter. Q. It didn't have anything to do with any other com-

panies?

A. Not with the merger, no, sir.

Q. Or with any company outside the merger?

A. No.

Q. Now, Exhibit 118, your letter to Mr. Davis, describes the meeting, at about the middle of the first page——

Justice Garrett (interposing). That is D-what?

Justice Stephens. D-20, the letter of September 20th.

By Mr. BROMLEY.

Q. Now, this is the only meeting, isn't it, that your Board of Directors committee ever had with Mr. Avery?

A. Reading this letter of September 20, which states that Mr. Miller was one of the committee, refreshes my memory to this extent, that Mr. Miller was an alternate to take the place of any other member who couldn't attend,

and Mr. J. B. Davis, who was a member of the committee, was unable to attend as he was up at his

summer home, up in northern Michigan.

Q. But this is the only meeting, isn't it-

A. (Interposing.) So far as I remember it, that is the

only meeting that committee had with Mr. Avery.

Q. I ask you that because in your earlier direct testimony in connection with Exhibit 102 which was the minutes of the Board of Directors' meeting held on August 19, 1925, a year before, you said something about a meeting between Mr. Avery and a committee which was appointed at that meeting, and I wanted to find out whether there was more than one meeting of any committee with Mr. Avery, or not.

A. I don't remember. This is the only committee I remember of which was appointed, but it has been so long ago that there might have been some other committee, but I don't recall at this time without something to refresh my

memory on the proposition.

Q. Well, the minutes of the meeting of August 19, 1925, Exhibit 102, have reference to the appointment of the same committee, Mr. Griswold. The evidence shows that only one committee was appointed, and what I want to ask you is as to whether or not it is not your best recollection that that committee only ever had one meeting with Mr. Avery.

A. The committee was appointed, but I don't think they had a meeting for some time after they were appointed, and

A. I think that is correct, I don't think the subject was ever mentioned because he had gone on record, and the other—ase had not been decided, and I considered there was no use to talk to him until there was some decision in the case. In so, far as our own company, the American Gypsum, was concerned, I don't think it was ever mentioned in any way up until that time.

Q. Now, in connection with Judge Jones' opinion, news of which you got on the golf course, do you recall that that patent infringement suit of USG against American had been tried before Judge Jones in January and February of

1928?

A. Before Judge Jones?

Q. In Cleveland, yes, that that suit, notice of the decision of which you got on the golf course, had been tried prior to that time and in January and February 1928.

A. I remember it had been tried, but I had forgotten about it being tried before Judge Jones. The record will

show that.

Q. Well, you remember that it was Judge Jones who decided it?

A. I remember Judge Jones decided it.

Q. And therefore you remember that it was tried before him, don't you?

A. Well, the one that I got the decision on, on July 7, there is no question about that. If there was

a trial before that, I have forgotten about it.

Q. In your exhibit, or rather in Exhibit 138, which is your letter to McCrady of December 27, 1927, will you look at the first paragraph, the second sentence, and see if that does not refresh your recollection that the trial of the USG infringement suit was held in January and February, 1928.

Mr. STEFFEN. What exhibit number is that, please?

Mr. Bromley. Exhibit No. 138, D-56.

The WITNESS. Now, what is your question?

Mr. Bromley. Will you repeat it, Mr. Reporter? (Thereupon, the pending question was read by the reporter.)

The WITNESS. Yes, it does.

Mr. Bromley. Now, will you stipulate, Mr. Steffen, that Judge Jones' opinion came down on June 30, 1928, and that the final decree was entered on July 11, 1928, subject to verification?

Justice Stephens. What is the exhibit you are examining on now?

Mr. BROMLEY. Exhibit No. 106, being D-6. I have just called his attention to the fourth paragraph.

1068 By Mr. Bromley.

Q. The reference, Mr. Griswold, in the sixth paragraph, the next to the last one, about your wanting to forward one copy to Texas—what did you want to do that for?

A. Well, the Texas Cement Plaster Company was figuring at that time on going in on my merger proposition, and I had assisted Mr. Gloyd of Texas Cement Plaster Company, in building their wallboard plant, and I wanted to advise him what we were considering doing, and in order to do so, I requested this proposed license agreement to send him a copy, so he could see what we proposed doing.

Justice Stephens. Please read that question and answer.

(Thereupon, the last question and answer were read by the reporter.)

Mr. Bromley. The reference should have been to the fifth paragraph instead of the sixth, I counted them incorrectly.

By Mr. BROMLEY.

Q. In the last paragraph, does your reference to the next meeting of the Industries mean that the license matter was to be discussed at an Industries meeting?

A. No.

Q. Were these license matters, under/USG patents, ever discussed at Industries meetings?

A. No, they were not.

Q. And you meant by that last paragraph, did 1069 you not, Mr. Griswold, only to suggest that if representatives were there from companies it would be a place where views might be exchanged on the situation existing with USG and its patents, and the litigation?

A. Yes. It was a pretty hard matter to reach all these fellows. There were only a few of them that manufactured board, but seeing them at a Gypsum Industries meeting, which they usually all attended, it was a convenient place to talk to those that were there that manufactured wallboard, and it would require no special trip.

Q. Will/you look at Exhibit—

Justice Stephens (interposing). Before you leave the last exhibit, may I make an inquiry? In the second para-

graph, "Mr. Haggerty apparently had"—should the word "not" be inserted there?

Mr. BROMLEY. Yes, sir, "had not a very complete report".

By Mr. BROMLEY.

Q. Would you look at Exhibit 113, which is your letter to Mr. Avery, dated August 31, 1926, being D-12, and tell me whether or not the last paragraph refers to your merger plans solely?

A. Yes, it does.

Q. And it is a fact, isn't it, that from time to time you would tell Mr. Avery how your plans were coming along, as well as other people, because everyone was

along, as well as other people, because everyone was

1070 familiar with it anyway?

A. Yes, there was no secret about it,. Everybody in the industry, I think, knew about it, and I used to talk to Mr. Avery about it the same as I would to any of the rest of my competitors.

Q. But as you have said, he was to have no interest in

it or be any part of it?

A. He was not interested in the merger part itself.

Q. But you knew then, and this was the reason, was it not, for your mentioning your progress to him, that your success in connection with the merger depended in part on your ability to settle the infringement claims which USG was asserting against the proposed constituent companies?

A. I would say yes, and I was trying to keep him posted on the progress of the merger proposition, whether there was a chance of its going through or not, and at this particular time the merger, as I remember, was up, and as I said, I made no attempt to keep it a secret from Mr. Avery if he asked, or sometimes I probably volunteered what information I had with reference to it.

Q. Will you look at your letter, Exhibit 114, to Mr. Avery, and his reply, Exhibit 115, the first of which is dated September 8, 1926, and the second, September 10, 1926—D-15 and D-16, respectively—and will you also look

1926—D-15 and D-16, respectively—and will you also look at Exhibit 118, which is D-20? Do you see that 1071 those exhibits, 114, 115 and 118, refer to a meeting between the committee of the Directors of the American Gypsum Company, and Mr. Avery?

A. Yes, the September 8th letter refers to a meeting of the committee consisting of Mr. McCrady, Mr. Davis and

myself.

Q. The purpose of that meeting was to discuss the matter of the American license only, and nothing else, isn't that it?

thought it ought to be, but that didn't mean that that is what is was.

Q. Did you ever have any agreement or understanding or arrangement of any kind at any time, either with Mr. Avery or anyone of your competitor licensees, about plas-

ter or block or tile prices?

A. No, we did not. We understood that that was illegal, to make any agreement with your competitor or any of those products outside of the one covered by the license agreement, and that that was legal, but that otherwise it was absolutely illegal.

Q. And it is a fact, isn't it, Mr. Griswold, that at no time while you were with the American Company, did it

take a license of any kind from USG?

A. It did not.

Q. Now, will you look at Exhibit 104, which is your letter to McCrady of May 12, 1926, and particularly the last sentence?

A. Yes. 1065

Q. At the time you wrote that sentence, Mr. Griswold, you thought a patent was good for twenty years, did you not?

A. That is what I understood, that a patent covered a

period of twenty years.

Q. And at the time you wrote that sentence, you knew, did you not, that the Birdsey patent issued in 1920?

A. The Birdsey patent? Q. Yes, sir.

1066

A. Well, I would say yes, that at that time I knew the

time of its issuance.

Q. So that under your then impression that a patent lasted for twenty years, at the time you wrote that sentence you thought that the Birdsey patent would not expire until 1940, isn't that right?

A. Well, I couldn't say just what I had in mind at that time. I don't remember, but I remember that we figured it had, I think, ten or twelve years to run, along about this time; and that a certain amount of the time had elapsed, but

there was still that much of it left.

Q. Well, I am trying to develop, if I can, what you had in your mind. Do you see the reference there, "holding the price steady on wallboard for the next fourteen or fifteen years"-do you see that?

A. Which paragraph is that in?

Q. At the very end of the letter: A. Yes, I see that, .

so far as I remember now, the only committee meet-1073 ing I remember of was when Mr. Miller was there; I don't think Mr. Davis, the other member of the

committee, was ever in Chicago on any business of that kind.

Q. So your best recollection is that there was only one

meeting of the committee with Mr. Avery?

A. So far as I know now, that is the only meeting of the committee with Mr. Avery; without something to refresh

my memory, that is the only one that I can remember.

Q. The testimony shows that following the execu-

1074 Q. The testimony shows that following the execution of the Beaver license in July, 1926, the Universal Company took a license in September, 1926. Now it is a fact, isn't it, that you had nothing to do with the negotiating of the license between USG and the Universal Company, which was signed in September, 1926?

A. Yes, I had nothing to do with either one of them.

Q. However, it is a fact that on one or two occasions, as disclosed by the correspondence, you asked Mr. Shearer of Universal how he was progressing in his negotiations?

A. Well, I probably did, I don't remember offhand without something to refresh my mind, of any particular meet-

ing where I asked him that.

Q. Well, the fact is that at this time, as well as later, you wanted to know how other negotiations were getting along so that you could get assistance from that, because you felt that the matter of negotiating and agreeing upon a contract was complicated, didn't you?

A. Yes, I always tried to keep as close track of what was going on as I could, and if I contacted somebody that I thought knew, I usually discussed the matter with them.

Q. Now look at Exhibit 118 again, your letter to Davis of September 20, 1926, D-20. In the next to the last paragraph on the first page, there is a reference to a Mr. John

McLease. Although it is spelled that way in the letter, you meant to refer to Mr. John MacLeish,

the general counsel for the U.S.G.?
That is right.

Q. Now looking further at that paragraph, the second sentence, which reads, "They explained very fully why they could not incorporate in the contract things which they admitted they would have liked to put in but which they could not put in"—now that is an illustration of the reference to this assurance that you asked from Mr. Avery in case he fixed a price so low that the payment of royalties.

became burdensome, isn't it?

A. Yes. Mr. Miller, who was on the committee, acting for Mr. Davis, was particularly insistent on having the promise that had been made as I remember at that time, of relief in case the selling price got too low, incorporated in the contract. That was one of the things he stood on, and as I say he represented Mr. Kling, one of the larger stockholders of the American Gypsum Company.

Q. Now look at that sentence again. That sentence didn't have any reference to any sub rosa or secret agreement about fixing plaster prices, or standardizing manufacture, or doing anything else, other than this royalty situation

that you have mentioned, did it?

A. It had nothing to do with any unpatented article. · It referred particularly to the type edge, and that was the only thing covered in the wallboard license

except, as I remember it, the license carried with it the right that the licensees should be entitled to the information as to the best methods of manufacture and so forth, that had been learned from the experience of the United States Gypsum Company. But it had nothing to do with other products.

Q. Now look at the second sentence in the last paragraph beginning, "It seems like this is a question of more faith in the other fellow". Again, isn't that simply a reference to this assurance which Mr. Avery gave you which he said he

would not put into the contract?

A. Yes, I would say it was, because it is my recollection that Mr. Avery had made the statement that in case the price of wallboard got so low that the payment of a royalty was causing a loss to the licensees, that in that case he would grant some relief, and this was the question that I referred to, of having confidence in the other fellow that he would do what he promised to do.

Q. And your reference in that same sentence to the "good of the industry", isn't that a reference to your idea that settling the litigation would redound to the benefit of the

industry?

A. Yes, that was my opinion of it, and always had been. Q. And when you said in the next sentence, "From a

legal standpoint it is a bad contract" and so forth. didn't you mean by that merely that you thought it was disadvantageous from American's standpoint,

but did not mean to suggest that it was illegal?

A. I meant that the fact that there was no written agreement of the licensor to protect the licensee from a legal standpoint made it a bad contract.

Q. And when you went on to say, "but it is a good deal like the one that Frank Carpenter passed on and the one we had with the Cleveland Builders"—what did you mean

by that reference?

A. Well, that was calling his attention to something that he was familiar with. We had leased from the Cleveland Builders' Supply Company, or the Cleveland Gypsum Company, these two mixing plants that they had in the City of Cleveland, and they were retailers, bought stucco from us or somebody else, and mixed it with sand and sold it as ready-mixed hard-wall plaster, we called it.

In negotiating these contracts, and in taking over their two mixing plants, the remuneration to the Cleveland Builders' and Cleveland Gypsum was based, as I remember it, on a tonnage basis, that we should pay them so much per ton for all the tonnage that we mixed and sold from those plants. The Cleveland Builders' Supply Company had a very large tonnage of their own, and I wanted them

to incorporate in the contract that they would give us all their entire tonnage. They objected to that be-

cause they thought the condition might arise that in order to keep peace in the family they might have to give some of that to some of the other manufacturers of stucco or calcined plaster. And I was calling Mr. Davis' attention to the fact that he was familiar with those contracts and that these people had lived up to their agreement and did, as I remember it, give us practically all of their business. They claimed they would give us the major part of it, and while it wasn't in the contract, they lived up to their agreement and had done what they said they would do.

Q. So you felt that you could safely, based upon that experience among other things, rely on Mr. Avery's assurance, even though he refused to put it expressly in the

contract, is that right?

A. Personally I had no question about Mr. Avery. When he promised to do a thing, so far as I knew he always kept his word, and I was perfectly confident that he would do as he had said he would do in this case.

Justice STEPHENS. We will suspend at this time. Do any of the lawyers need these photostats during the evening?

Mr. JOHNSTON. I might borrow Judge Stephens' copy this time.

Justice GARRETT. Mine is available here also.

Justice JACKSON. And mine also.

Mr. Steffen. We have one question that we would like to ask, if permissible?

Justice STEPHENS. Certainly.

Mr. STEFFEN. In view of the difficulty of getting hotel reservations and one thing or another, we would like to know if we could have any estimate of when defense counsel would be through with Mr. Griswold. We realize that it is possibly something we shouldn't ask, and we only do so because of the difficulty of getting hotel accommodations and transportation reservations.

Mr. Bromley. I won't be long. How long have I been already?

Justice STEPHENS. About an hour and a half.

Mr. Bromley. I think not more than another hour and a half.

Justice STEPHENS. You will be through with him tomorrow at any rate?

Mr. BROMLEY. Yes.

Justice Stephens. How about counsel for the other defendants; how much cross examination do they wish to add to that of Mr. Bromley?

Mr. JOHNSTON Mine will be very short.

Justice STEPHENS. How about you, Mr. Finck?

Mr. FINCK. Mine will be ery short, if any.

Mr. ADAMS. And the same with me.

Justice STEPHENS. Do you gentlemen think it likely that we can be through with Mr. Griswold to-morrow?

Mr. BROMLEY. I think so.

Justice STEPHENS. How about redirect examination?

Mr. STEFFEN. That will be short.

Justice STEPHENS. Very well, announce the recess.

(Whereupon, at 4:07 o'clock, p.m., the trial was recessed until Tuesday morning, November 23, 1943, at 10:00 o'clock).

## 1081 In the District Court of the United States for the District of Columbia

Civil Action No. 8017

United States of America, Plaintiff

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING, Washington, D. C., Tuesday, November 23, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances: (Same as heretofore noted).

1084 FRANK J. GRISWOLD, the witness on the stand at the time of adjournment, resumed his testimony as follows:

## CROSS-EXAMINATION (RESUMED)

Mr. BROMLEY. May it please the Court.

By Mr. BROMLEY.

Q. Mr. Griswold, we were looking at Exhibit 118 yesterday, D-20. Will you turn to the second page of that exhibit and look at the first paragraph on the second page at the top, beginning with the first line, "It is the same".

Justice STEPHENS. The second page?

Mr. BROMLEY. Page 2, at the top, the first sentence beginning "It is the same".

Justice STEPHENS. I see.

By Mr. BROMLEY.

Q. That sentence again is a reference to what we have talked about before, that is, to a promise by Mr. Avery orally referring to obtaining relief if hardship resulted from the

lowering of the price to such a figure that the payment of the fixed royalties might become burdensome; isn't that so? A. Yes.

Q. And that is all that was intended by that sentence, is it not?

A. Yes.

Q. Will you look at Exhibit 119, D-21, please, your letter to Mr. Avery of October 7, 1926. Is it true that the first paragraph of that letter refers to the matter of American taking a license, and was not intended to refer to any other companies taking a license?

A. Yes.

Q. And that is made plain from the letter itself, by reference to the next paragraph, isn't it, Mr. Griswold, which recites that two of your Directors have been away?

A. Yes. Two of the Directors had been away, and we had had no opportunity to discuss the matter further for

some time.

Q. And finally, does the third paragraph of that letter, Exhibit 119, refer merely to the merger, and nothing else?

A. The last paragraph of the letter had reference to the merger.

Q. And nothing else?

A. Nothing else.

Q. Will you look at Exhibit 121, which is D-13, please, Mr. Griswold's letter to Mr. Avery of October 9, 1926. Will you read the first paragraph, please, and tell the

Court whether that isn't a reference to a meeting 1086 which you had with Messrs. Fuller and Channing of

Atlantic which was for the principal purpose of their obtaining advice from you as to the proper construction of

the plant which was then being built for Atlantic?

A. Mr. Fuller and Mr. Channing were connected with the Atlantic Gypsum Company, which at that time were just beginning the construction of a plant at Portsmouth, New Hampshire. And in those days it was pretty hard to get information from other manufacturers, as most of them were rather backward about giving any information to someone that was considering entering the business. But I having been engaged in the building of these gypsum plants and furnishing machinery for them for years past, they rather thought that I was the person to come to; and furthermore, they had employed a Mr. Brown, as I remember it, to construct their plant, and he advised them to see me, I don't know for what purpose, he probably knew my experience in the gypsum business.

But anyway, they came out to Port Clinton to talk matters over with me, and to see what they could see. As I remember it, I showed them the plant at some time, I don't remember whether this was the time or not, but I showed them through and showed them the manufacturing process and the machinery as it was in actual use.

Q. Would you say, Mr. Griswold, that the principal purpose of the meeting was for them to obtain advice in connection with the construction of their

new plant?

A. Yes, as I remember it that was the purpose of their

visit.

Q. And were you told by one or the other of these two gentlemen that the Atlantic Company at that time contemplated making board, and that it was in their minds that they would make an open-edge board?

A. Well, I could not say as to that without reference to something to refresh my mind. I haven't read this letter, but if it refers to it, it might have been discussed at that

time.

Q. No. I see no reference to this in the letter.

A. The first time they were out to our plant, that is referred to here, as I remember it it had to do at that time with the construction of the building and the machinery proper for making hard wall plaster and neat cement plaster; and I think that going into the board business, as I remember it, was something that came up after this. However, I might be mistaken.

Q. Do you notice in the body of the letter, in the fourth paragraph at least, that you ask whether Mr. Avery sees any objection to your giving them a copy of the license

contract?

A. Well, that refreshes my mind to this extent, 1088 that there must have been something said about that, that they intended going into the wallboard business. Otherwise, I probably wouldn't have put that into the letter.

Justice Jackson. Isn't that in the letter in the second paragraph?

The WITNESS. In the second paragraph?

Justice Jackson. Yes, that "they claim they are going into the manufacture of gypsum wallboard".

The WITNESS. That has reference to a pulp board. That is made from paper products. They didn't use gypsum in that at all.

Justice Jackson. Well, it says "as well as the manufacture of a pulp board".

The WITNESS. I beg your pardon, it does mention that. Well, they must have brought the matter up at that time, because it has been so long ago I really don't remember. As I remember it, there was more than one trip, and just what came up at the first trip, my recollection was that it was the construction of their plant.

By Mr. BROMLEY.

Q. Can you recall whether or not, in this conference, you pointed out to them that if they were going to make a gypsum wallboard, the closed-edge board was a cheaper product to make and was a better product to make, and had

fewer manufacturing difficulties?

1089 A. Well, as I remember it, we had gone all through the plant, which would include the wall-board plant, and explained to them the process of manufacture. And while I have no distinct recollection now, the probabilities are we discussed the type edge we were making, the open type edge, and the type that the United States Gypsum Company were making under the Utzman patent. And at some time. I couldn't say it was just at this date, I explained to them—and it was probably at this time—the difficulties of manufacturing that we had under this Birdsey patent, what they would have if they tried to make it. And at one time I think they asked me whether we would allow them to make this Birdsey type—we called it the Clark type. Anyway, as I remember it, I explained to them the difficulties that we were having, and also our experience with the open type edge, and the advantages of making a closed type edge, which we were not making and had not made since we started, but with which I was quite familiar.

And as I remember it, I gave them the advice that the best thing for them to do, if they were going into the board business, was that they make a closed type edge, providing they could reach an agreement with Mr. Avery of the United States Gypsum Company, who held the patents. And whether they asked me to or not, I can not say, but

this letter indicates that I sent them a copy, wrote 1090 to the United States Gypsum Company to send me a copy of their proposed license agreement which I was to forward on, as I remember it, for their inspection.

Q. Then it is a fact, is it, that about this time you gave the Atlantic Gypsum Company, in effect, an oral license to manufacture a semi-closed-edge board under your Clark application for a patent? A. State that again, I didn't get that clear.

Mr. Bromley. Will you read it, please? (The question was read by the reporter.)

The WITNESS. Well, we had never got that far along to give it to them, but I, as I remember it, gave them assurance that so far as we were concerned we would not object if they made that particular type edge, if they cared to do it.

By Mr. BROMLEY.

Q. Now you have said that thereafter you received a copy of a form of contract from Mr. Avery and forwarded it on to Messrs. Clark or Fuller; is that right?

A. Yes. Q. And that, I believe, is shown in Exhibit 122, D-14, being Mr. Avery's letter to Mr. Griswold of October 11, 1926. That letter shows, does it not, Mr. Griswold, that Mr. Avery didn't know these gentlemen and therefore didn't think it proper for him to send the contract directly to them, and for that reason he sent it to you?

A. Yes; and as I remember it, also, I had requested him to forward it to me so that I could forward it on

to them.

Q. In other words, the request that the contracts go to these gentlemen was your request and not Avery's?

Q. You never heard anything more about the matter subsequent to the time that you, forwarded the copy of the contract to Atlantic, sometime in October, 1926, until sometime early in 1927 you heard, did you not, that Atlantic had taken out a license with USG?

A. I don't remember of hearing anything further about the matter until I learned—I don't remember now how I learned—that the Atlantic had applied to the United States

Gypsum Company for a license agreement.

Q. Well, at least you had no part in the negotiations which resulted in the execution of the license contract between Atlantic and USG?

A. No, I did not,

Q. And you did nothing after October, 1926, by way of inducing or attempting to induce either Atlantic or USG to enter into a contract with one another?

A. I have no recollection of seeing them after that until I got this information that they had applied for a license agreement, I don't know whether they had taken it

out at that time, but they had applied for it.

Q. By the way, this Mr. Channing referred to in

Exhibit 121 was the Boston lawyer for the Atlantic Gypsum Company, was he not?

A. Yes, he was their attorney.

Q. Will you look, please, at Exhibit 124, D-26, which is Mr. Avery's letter to you of October 19, 1926, and particularly at the last paragraph. Is it a fact, Mr. Griswold, that again that is a reference to your efforts to bring about your proposed merger, and to nothing else?

A. The last paragraph?
Q. Yes, sir.
A. That had reference to the merger.

Q. And nothing else? A. Nothing else.

Q. Will you look, please, at Exhibit 125, D-23, your letter to Mr. Avery, the date of which is now stipulated to be October 20 instead of October 9. The first paragraph shows, does it not, that prior to the date of this letter there had been no meeting of prospective licensees such as you had planned prior to this date?

A. The letter so states, and that is my recollection of it.

Q. Now look at Exhibit 127, D-28, another letter of yours to Mr. Avery of November 1, 1926, and page 1093 ticularly to the third paragraph. That refers to your attempt to arrange another meeting, does it not?

A. Yes.

Q. Now isn't it a fact that no meeting was held such as this letter indicates was contemplated as of November 1, 1926?

A. That is was (Interposing.) That it was not held.

A. Well, I don't remember, without something to refresh my mind, whether it was held or not. It was anticipated, according to this letter.

Q. Well, as I read the correspondence, it is not shown

that there was any subsequent meeting.

A. Oh, a subsequent meeting. I would say no, that there was not.

Q. Will you look at Exhibit 128, D-29, please, your letter to Mr. Avery of November 16, 1926. The last paragraph. Mr. Griswold, is again a reference by you to your efforts in connection with your proposed merger, is it not?

A. That had reference to the merger.

Q. Will you look at Exhibit 130, please, which is D-31, your letter to Mr. Avery of November 29, 1926. The first paragraph of that letter purports to give the reasons why your company, the American, would not take a license, does it not?

1094 A. I would say yes.

Q. Now isn't it a fact that at this time you were trying to stall Mr. Avery to some extent, and avoiding a definite rejection to Avery's offer, if you possibly could?

A. That is rather a leading question, but I would say yes, to a certain extent, for the reason that we were anxious to get some decision, legal decision, on the matter before even my own company took any definite action on it, and at this time I/don't think there had been anything that was considered definite. And as I stated, we wanted to know whether we were going to be compelled or forced by law to do this or not.

Q. Well, I put it in a slightly leading form because of the last sentence of that paragraph, in which you say, "The writer hopes to submit something for your consideration in the very near future." That seemed to suggest to me, and I ask you now whether it does'nt suggest to you, the fact that at that time you didn't want to break off negotiations, in spite of the opposition of your fellow Di-

rectors?

A. Well, I could not say at this time. I think it also had reference to or connection with this merger proposition, that if the merger went through I was to be in control and would have the say as to whether the new company took out license agreements that covered all of the companies merged,

or not. Possibly I had that in mind, but I can not.

1095 say at this time.

Q. Well, that may be so, because it is a fact, isn't it, that the reference in the next paragraph to proposition No. 2, you can clearly remember is a reference to your proposed merger?

A. Will you state that question again? Will you repeat

the question?

(The question was read by the reporter.)

The WITNESS. The last paragraph there refers to the merger and to what I have just stated, that if it went through it would change the situation all around to this extent, that my own directors were opposing taking the license agreement under the conditions, and so far as the other companies that were going into the merger were concerned, the authority to take out a license agreement would rest with me in the new company which these companies would merge into.

## By Mr. BROMLEY.

Q. And these fellow directors of yours in American, who were opposing the proposition, would be out of the business and have no connection with the merged company, isn't that a fact?

A. Well, the greater majority of the stockholders, those that controlled most of the stock, were directors in the company, and under this merger proposition a stockholder

of any company had the right to either stipulate. whether he wanted cash or to take stock in the new 1096 merged company. And our own people were getting pretty well along in years, most of them were older than I was, considerably, and I advised them that this was an opportunity for them to take their money out of the business in cash and retire while they had a chance. Mr. McCrady and all his family, several of whom were stockholders, and Mr. Kling and his associates, Mr. Davis, and the Gilleland Estate, they had all elected to take cash. And the minority interest, which was mostly held at Port Clinton where I lived, and where the plant was located, were willing to take stock in the new company for their interest, but the rest of them were to retire from the business entirely and have no connection with the American Gypsum Company.

Q. So that when the merged company came into existence, the directors of American who were opposing taking a license would not be in control of the Board of Directors

of the new company, would they?

A. The new company?

Q. Yes.
A. No, the Board of Directors would be composed of entirely new people, and none of the old directors, with the exception of myself and I think a Mr. Tadsen was on at that time, a Port Clinton man, who would be connected with the new company representing the Port Clinton interests.

Q. Will you look at Exhibit 132, your letter to Mr. Avery of January 3, 1927, and will you please tell me whether, in the second paragraph, your reference in the first sentence as follows: "I started out to deliver 100 percent of the manufacturers of board that would be willing to sign up", represented any agreement that you had with Mr. Avery, or understanding with him, that you would go out and get 100 percent of the manufacturers to take his license?

A. No, we had no agreement to that effect.

Q. And you have told us heretofore, and yesterday, that he never asked you to do that. Is it a fact, then, that you were a mere volunteer in what you did?

A. I would say yes.

Q. In the third paragraph, Mr. Griswold, is it a fact that the second sentence, beginning "I regret to say", is a reference to the failure to settle the litigation and eliminate the dissension in the industry, and was not intended by you to refer to any failure to obtain a price-fixing arrangement

in the industry?

A. No, it was simply a statement that what had happened in this territory was only what I expected would happen if they continued this litigation, with the feeling that attended it, and I haven't read all of this yet but apparently that is what had happened. That is all that I recall at the present time, except that the letter mentions the Atlantic Gypsum Company.

Q. Well, the letter mentions at the bottom of the page that the Atlantic Gypsum Company is willing to enter into a license, is that what you refer to?

A. Well, I state in the letter, which is clearer than my recollection without it, that the "Atlantic Gypsum Company are just about ready to start the manufacture of wallboard, and they too will manufacture an open-edge board unless some agreement can be reached on a shorter

time contract."

Q. Now will you look at Exhibit 136-A and Exhibit 136-B, both of which are copies of your letter to Mr. Williams of National, D-41 and D-42, of March 24, 1927. It is a fact, isn't it, Mr. Griswold, that at the time of this letter, or thereabouts, you had had discussions with Mr. Williams of National with respect to National becoming a part of your contemplated merger?

A. Which exhibit are you referring to?

Q. They are both the same.

Justice STEPHENS. One is a photostat of the other, Mr. Griswold, or rather, both are photostats, one being of the original and one being of the carbon copys.

The WITNESS. I haven't read it.

Jusice Stephens. Take your time and read it.

The WITNESS. Now will you repeat the question? (The question was read by the reporter.)

The WITNESS. Yes, I had talked with Mr. Williams. I do not remember any particular date or just where, but he used to come through Port Clinton on his way from Buffalo to Chicago, he had his headquarters at Chicago but he used to drive an auto most of the time, and

he usually used to stop and call on me as I had known him for a number of years.

By Mr. BROMLEY.

Q. Look at the last paragraph, particularly the portion beginning with the 7th line from the bottom, "I would like to urge upon you to discuss the matter with Mr. Haggerty"—isn't the reference which immediately follows "Haggerty"—"because our organization, when we get lined up, will soon reach an agreement, which, if the Certainteed comes in, and I am sure they will, will make it 100% with all manufacturers"—isn't that a reference again to your proposed merger?

A. Yes, because if this merger was consummated and I had the authority to take out a license agreement for all the companies that it represented, that would clean up the situation with the exception of certain other companies here that I mentioned in the letter, which would make 100 percent of the manufacturers that were making wallboard.

Q. What I wanted to know specifically was whether or not the two words, "our organization", in that sentence,

did not refer to your proposed merger?

A. As I had in mind there, this Mr. Martin Johnson that I referred to, and Mr. Elmer Webber of the finance com-

pany, were taking some interest in this proposition, 1100 of course, because they were financing it, and the probabilities would have been that Mr. Johnson would have been a director in the new merged company if that had gone through, and as I remember it now "we" probably had reference to those two gentlemen—our new organization would include Mr. Martin Johnson and possibly Mr. Elmer Webber.

Q. Well, as used in this sentence, "our organization". referred to the proposed merged company, didn't it, Mr.

Griswold?

A. That is my recollection now, that it referred to the

new merger.

Q. Now in the next to the last line, beginning "do away with the legal complications", you will notice that you have changed the word "proceedings" to "complications". That is a reference to the patent litigation which was in existence throughout the industry, and was not intended to be a reference to price control; isn't that so?

A. Yes, it had no reference to price control. By taking out this license agreement it did away with all the litigation that had been going on, or would go on, over wallboard, as we all were advised, and I think everybody understood

that the granting of a license gave the right to the licensor, the owner of the patent, the right to tell us what price we should sell the product for.

Q. Now will you look at Exhibit 141, which is 1101 -D-61, being your letter to McCrady of April 12,

1928. You weren't responsible, were you, Mr. Griswold, for the fact that the Beaver Company had taken out a license with USG?

A. No, nor I don't think I ever claimed I was. I had had very few meetings with anybody outside of a very few with

Mr. Blagden.

Q. And likewise, you wouldn't say that you were responsible for the fact that the Atlantic Company took out a license, would you?

A. No, other than recommending to them that that was the best thing for them to do from a manufacturing stand-

point, I had nothing to do with it.

Q. And you weren't responsible for the fact that the Universal Company had taken out a license prior to the

time of this letter, either, were you?

A. No, other than trying to offer my services to help them settle their own troubles, which had nothing to do with this license agreement. I had nothing to do with or claim no credit for that.

Q. And you wouldn't say that you were responsible for the fact that the Texas Company took out a license, either,

would you?

A. Further than recommending it; they went ahead of their own accord and took it out, without consulting me.

Q. And it is a fact, isn't it, that so far as you know, Mr. Blagden had absolutely nothing to do with the taking out of any of these licenses which I have mentioned except his own, that is, the Beaver license?

A. So far as I know, he did not have. If he did, I wasn't

aware of it.

Q. Now in the 8th line from the end of the first paragraph, you see the reference to George W. Brown, President of the Certainteed Products Company, "and it was his own personal opinion that if"—naming some companies— "would all get together and agree".

Do you see that sentence?

A. Wes.

Q. Now that reference, "and it was his own personal opinion", that is a reference to Mr. Blagden's personal opinion, isn't it?

A. Mr. Blagden's opinion, yes.

Q. You say that it was Mr. Blagden's personal opinion that if American, National, Ebsary and Niagara would get together, and so forth. Now isn't it a fact that that reference was merely to Blagden's idea, and that you did not mean to suggest that there was any arrangement or understanding among these companies that they would all get together and take a license?

A. There was no agreement to do so. They only arrived at this after a careful consideration of what was

1103 the best thing to do for the industry.

Q. And it is a fact, isn't it, that at no time did these companies ever agree with one another that they would take out licenses?

A. Not to my knowledge, they never agreed to do so.

Q. Now will you look at Exhibit 144, which is D-78, your letter to Mr. Holland of September 10, 1928, and the last part of the first sentence in the second paragraph, after you have said there is not a ghost of a show of your Board taking a license, the next sentence reads: "If they will amend the agreement to give their licensees some protection and consideration for the money they get paid, I am inclined to think our people would consider", and so forth.

Now isn't that a reference to the subject which you have mentioned many times, that is, relief if royalties became a hardship in view of the fixing by USG of a low price?

A. I would say yes. My memory is also refreshed by this letter to this extent, that at this date, September 1928, Mr. Kling had again become a Director in the American Gypsum Company, and he was also Chairman of the Board, and he was always opposed to this license agreement unless he could get certain things incorporated in it that he wanted. And I had become convinced—and I was getting a little disgusted with my own company—I had become convinced, apparently, that there wasn't much

chance, unless there was some change made in the 1104 agreement and something to satisfy them, that there wasn't any chance of the American Gypsum Com-

pany taking out a license agreement.

Q. Now look at the last paragraph of this letter, Exhibit 144, and particularly to that part of it which says, "but we are just coming on the market with a new closed edge Board, which we think will prove very satisfactory"—that is a reference to the type of board which you talked about yesterday as having the porous tape inserted on the raw edges, isn't that so?

edges, isn't that so?

A. Yes. Prior to this time the decision of the court had been rendered which compelled us to discontinue making

the Birdsey type, and furthermore to dispose of all we had in stock. And if we wanted to stay in the board business we either had to make an open-edge board or plan something new that we were sure did not infringe on the Utzman type, or else go out of the board business.

Q. Well, in this letter you say, "which we think will prove very satisfactory to the trade." Now as you said yesterday, it didn't prove to be satisfactory to the trade at all, did it?

A. Well, not entirely. It was satisfactory probably to some of them, but not as satisfactory as we hoped it would be. This, bear in mind, was before we started to manu-

facture it, we were just beginning. After we got into it, we learned some things that probably we 1105 didn't know at the time we first started in.

Q. Well, at least it is the fact, isn't it, that it turned out

to be very unsatisfactory to you?

A. Yes, from a manufacturing standpoint alone it was too expensive to make.

Q. And did you soon give it up?

A. Well, I left the company on the 1st of February, 1929. This letter is dated September 10, 1928. My recollection is that we were still making that type board up to the time I left, but what happened after that I couldn' say

because I had nothing to do with it.

Q. Will you look at Exhibit 146, which is D-73, your letter to Mr. Holland of September 19, 1928. Referring to the second sentence of that letter, Mr. Griswold, it is a fact, isn't it, that as you reported to Mr. Holland, USG never changed its position, and as of this time in 1928 was still insisting on the same terms for any license as had first been granted to the Beaver Company several years before in 1926?

A. I think that is correct. I have no recollection of the United States Gypsum Company ever changing any of the conditions or terms of the original patent agreement with

the Beaver Board Company.

Q. Now at the end of the first paragraph, will you notice your reference to the phrase in the fourth line from the end to "what might be quite a siege in warfare". Was that intended by you to be a reference to the litigation and consequent dissension in the industry?

A. What part of the letter is that?

Q. The fourth line from the end of the first paragraph. I ask you whether or not, by the use of the phrase "quite a siege in warfare", you intended only to refer to the liti-

gation and resultant dissension in the industry?

A. Yes, it had reference to the litigation, because if they controlled the patent they would evidently stand on it until the expiration of the patent date, whatever that was, it would continue for some time.

Q. And two lines down, the next to the last sentence of that paragraph, where you say, "it will not be long before an armistice of some kind is agreed upon," was it your intention to refer to possible settlement and disposition of

the litigation?

A. That was the hope, that these different companies would arrive at the conclusion that that was the sensible thing for them to do, to take out a license agreement, and that would end all the trouble that existed and had existed over it in the past.

Q. Now will you look at Exhibit 147, and there seems to

be no "D" number for this one, which is Mr. Hol-1107 land's letter to you of September 20, 1928. In the second paragraph of this September 20, 1928, letter is a reference by Mr. Holland to a proposed meeting, and he says: "I was in hopes that you would be in a position to attend such a meeting in case the others were so disposed."

Having looked at this letter, are you able to tell me, if it be so, that as a matter of fact no meeting was held sub-

sequent to this time, at least to your knowledge?

A. With the Universal, you mean?

Q. No meeting of representatives of any proposed licen-

sees, or others, about the license matter.

A. I could not say as to that definitely without something to refresh my memory. I do not remember of any meetings, but there possibly might have been. But if there was, the correspondence would probably show it.

Q. I do not think the correspondence shows it. And is it your answer that you have no recollection now that there

was any meeting subsequent to this date?

A. I have no recollection of any meeting later than this date. One explanation of that is the fact that after Mr. Kling became Chairman of the Board of the American Gypsum Company, which was prior to this date, I do remember this, that I made up my mind at that time that unless this merger deal went through, and the bankers

didn't seem to be making any progress with it, that

Gypsum Company for the reason that I didn't feel that Mr. Kling and I could ever get along, we had different views on business.

Q. A minute ago, in talking about Exhibit 146, your letter to Holland of September 19, 1928, you said, as I recollect, it something about disposing of the trouble in the past. Did you mean by "trouble in the past", the litigation to which you have so often referred?

A. Which letter was that?

Q. That was in your answer when you were talking about Exhibit 146. You said something about disposing of trouble in the past. You meant by that, I take it, the

patent litigation which-

A. (Interposing.) Presumably I did, I do not recall of any other, because this litigation had been going on since—it originally started with the Best Wall Board Company around 1918 or somewhere along there, and this was several years after that, it had been going on for some time.

Q. It is a fact, isn't it, Mr. Griswold, that as of January, 1927, your own company, American, had not made any

agreement to take any license from USG of any kind?

A. Yes, that is a fact.

Q. And that was likewise true of the Certain-teed Company as of January, 1927, was it not?

A. Yes, I am sure that they had not.

1109 Q. And likewise, it was true of the National Com-

pany, as of January 1927, was it not?

A. Well, you are asking me simply with reference to dates, and it is pretty hard for me to remember the exact dates. There have been a few questions prior to that asked. I would say that they were negotiating, but whether they had actually entered into the agreement or not, I can't say. But the record will show.

Q. What I wanted to find out from you if I could, and you could remember it, was whether, as of January, 1927, the National Gypsum Company had agreed to take a license. Of course, we all know that they didn't take one until

1929,

A. My recollection is that at that stage in the game they had agreed to, anyway, because I think I had that knowledge; on account of this merger, I was keeping pretty close tabs on what concerns were going in.

Q. Well, as of January, 1927, the Texas Company hadn't

agreed to take a license, had it?

A. No, I don't believe they had taken out a license at that time.

Q. And neither had the Ebsary Company as of January,

1927, agreed to take a license, had it?

A. No, I am quite sure Ebsary hadn't taken out any license at that time.

Q. And as of that date, January, 1927, neither olicense? had the Atlantic Company agreed to take out a

A. Well, I couldn't say as to Atlantic without some ref-

erence to it, some letters, I mean.

Q. And can you remember about Niagara as of this date,

January, 1927?

A. I don't think that had taken out a license. They had talked settlement for past infringements up to a certain time, but I don't remember of the Niagara having actually taken out a license agreement.

Q. And you don't remember that as of January, 1927,

they had agreed to take out one, either, do you?

A. No. I don't think they had agreed, for this reason: If the Niagara Gypsum Company went into this merger that I was agitating at that time, Mr. Reeb had elected to take cash for his interest in the Niagara and he was to drop out, and I imagine, or rather I know that he felt that the merger was going to go through, and I don't think he had gone ahead with his license agreement. He might have been willing to do it, but I am sure he hadn't done it at that time.

Q. Now will you look at Exhibit 150, which has "D" number, your letter to Texas of February 21, 1927, the second sentence, reading, "My guess is that everything is going to come out all right on this deal, because it looks now like the proposition Johnson has been working on is almost sure to go thru, and it will be decided the coming week". That is a reference simply and solely to your proposed merger, again, isn't it?

A. That had reference to the merger exclusively.

Q. Now that is true as to the next two sentences, isn't it? "I expect all contracts to be signed up by that time ready . to proceed with the business". That is the next sentence: that has reference to the merger, does it not?

A. That has reference to the merger because there were contracts with each company as to just what was to be

done.

Q. And the next sentence—"If this occurs, I feel sure we will be able to get along with Mr. Avery again is a reference to the merged company, isn't it?

A. Yes, that had reference to the new company that would

be formed after the merger.

Q. And finally, the last sentence of that paragraph, "All of us I think will be willing to go in on the long time contract if he will give us some assurance that what he has told us verbally will be carried out by someone else in case he should not be on the job". That is, again, merely a 1112 reference to this assurance that you wanted that he wouldn't let the royalty obligation cause you a hardship in the event he set a low price on the product, is

that right?

A. Yes, someone had raised the question as to what would happen if Mr. Avery should be out of the picture, or suppose he should die very suddenly. There was nothing in this contract about what he had proposed verbally, and they had raised that question as one of the arguments that something should be in there.

Justice STEPHENS. The Court will take a recess for five minutes before you proceed with the next exhibit, Mr. Bromley.

(Whereupon, a five minute recess was taken, after which

the hearing was resumed).

By Mr. BROMLEY.

Q. Will you look at Exhibit 152, D-48, your letter to Mr. Gloyd of March 14, 1927. The third paragraph of that letter again is a reference to your proposed merger, isn't it, Mr. Griswold?

A. Yes, that is a reference to the merger.

Q. And the fifth paragraph shows what you testified to, I believe, that Atlantic had signed up as of this time directly with USG and that you had had no connection with, or nothing to do with, that negotiation; isn't that true?

A. At this writing I had evidently heard that the Atlantic Gypsum Company had signed up their license agreement with the United States Gypsum Company, but I had nothing to do with it, other than what

I have already testified.

Q. And finally, the last paragraph is again a reference to your work in getting your merger into shape, is it not?

A. The last paragraph has reference to the merger.

Q. Will you look at Exhibit 153, please, for which there is no "D" number—

Justice Jackson (interposing). It is D-49 on the copy. I have here.

Mr. BROMLEY. Thank you.

By Mr. BROMLEY.

Q. That is Gloyd's letter to you of March 25, 1927. Doesn't the first paragraph of that letter refresh your recollection so that you can now testify that Gloyd had decided to apply for a license independently, and that you had no connection with his decision to take a license?

A. Other than the first interview to which I testified, I

had nothing to do with it.

Q. And the second paragraph of Mr. Gloyd's letter, Exhibit 153, you understood to be a reference by Mr. Gloyd to this assurance of Avery that he would not permit royalties to work a hardship on the licensees, did you not?

A. Yes, that had reference to his verbal statement, and my own company was objecting to the proposed agreement

without something of that kind.

1114 Q. When you say "his verbal statement"; you mean Mr. Avery's verbal statement?

A. Yes, that he would grant some relief.

Q. And that relief was that he would grant some relief in the amount of the royalty if the price got down so low that the royalty payment became a hardship on the licensees?

A. That is correct.

Q. Will you look at Exhibit 155, please, D-51, your letter to the Texas Company of March 31, 1927. In the third paragraph of that letter, the words "our deal" in the second line, are a reference to the merger, are they not, sir?

A. That has reference to the merger.

Q. Now the last paragraph of that letter is a reference merely to the fact that you had chanced to meet someone from National and inquired from that someone as to National's position on the license matter, isn't that so?

A. I would say yes, that that is correct.

Q. You did not mean those words to be interpreted that you were telling the Texas Company that you were

acting as agent for National, did you?

A. No. I am sure that Texas understood that, that I was only acting in my own behalf in the interest of these merged companies. Texas Cement Plaster Company was one of the companies that was supposed to be included in the merger.

Q. Now don't you see from this paragraph, Mr. 1115 Griswold—and doesn't it refresh your recollection in connection with the matter I ask you about before recess—that as of this date, which was subsequent to January, 1927, as a matter of fact the National Company had not agreed with anyone to take out a license?

A. Apparently they had not signed up their license agreement, and I so state in this letter, that that was the informa-

tion I had received.

Q. Doesn't this last paragraph go farther than that in refreshing your recollection, so that you can now state that as of January, 1927, they hadn't even made up their

minds or told anybody that they had decided to take a license agreement, and that therefore they had not, of course,

agreed with anybody that they would take one?

A. Well, the only thing I remember is what I indicated here in the letter, that they apparently had advised me that they were thinking of it favorably, that they had not taken it out but were considering it favorably, and that is what I was reporting to Mr. Gloyd.

Q. Doesn't that refresh your recollection that as a matter of fact they had not, as of this time, made up their minds

yet as to what they would do?

A. Well, I could not say what they had made up their minds to do any further than what the information they

gave me was, that they were considering it favor-1116 ably, which indicates that they had evidently not made up their minds at that time but were only

considering it.

Q. Now, sir, will you look at Exhibit 156, which is D-52, Mr. Gloyd's letter to you of April 5, 1927. The last paragraph again is a reference to Martin Johnson, the Chicago insurance/man, and your proposed merger, is it not?

A. Yes, that had reference to the merger.

Q. Will you look at Exhibit 157, please, which is D-53, your letter to Gloyd of April 9, 1927. Isn't it a fact that the third paragraph of that letter is a recitation of mere rumor and that you do not purport to set forth any facts in that paragraph, Mr. Griswold?

A. Repeat the question, please.

Mr. Bromley. Will you read it? (The reporter read the pending question.)

The WITNESS. I would say it was a rumor. I have no recollection of personally interviewing the Certain-teed Products, which is the company mentioned in the letter.

By Mr. BROMLEY.,

Q. Now likewise, in the fourth paragraph, the fifth line, which says, "because I was able to induce the Atlantic Gypsum Products Company to take out a license" and so forth, in view of what you have already told us, that statement is not entirely correct, is it?

A. Well, I think I was probably taking more 1117 credit than I was entitled to. As I have testified, my only talk that I had with the Atlantic Gypsum Company was the one referred to, where I recommended and explained it to them why I thought it was to their best interests from a manufacturing standpoint to manufacture a closed-edge type board.

Justice Stephens. Will you read the answer, please? (The answer was read by the reporter.)

By Mr. BROMLEY.

Q. In the fifth paragraph, the opening sentence, "Mr. Avery seems to be very appreciative of the work his friends have done, which will do away with all the troublesome and distasteful litigation"—it is a fact, it is not, that one of the things you were striving to obtain was Avery's appreciation, so that you might get a more favorable deal with him?

A. Well, I was trying to impress Mr. Avery with the fact that through this merger, if it was successful, it would do away with at least that many of the companies that were manufacturing board, and do away with any of the litigation, so that you might get a more favorable deal with him? appreciate the efforts that I made along that line, naturally, and wouldn't make it any harder for me on the merger, or wouldn't make it any harder on the American Gypsum Company, if the merger did not go through.

Q. Wouldn't make it any harder for you to take out a

license, you mean.

A. Yes.

1118 Q. And settle the damage claim which he had

against you, is that right?

A. The settlement would mean of the damage claim for past infringements, and also the amount of royalties which we were to pay for the use of the Utzman or Clark patent, whatever it was we were going to use, the Clark patent, known afterwards as the Birdsey patent.

Q. Now, sir, the rest of the letter has to do exclusively

with your merger, does it not?

A. What paragraphs are you referring to?

Q. The rest of the letter, beginning with the fourth line from the bottom of page 1, "It might interest you also to know"—and from there on to the end.

A. Yes, that had reference to the merger.

Q. Now, will you look at Exhibit 159, which is D-55, please, your letter to Gloyd of April 13, 1927. It is a fact, isn't it, that the conference to which you refer in the second

paragraph as a matter of fact was never held?

A. I couldn't say without reference to some letter as to whether it was held or not. This states that I was leaving on an afternoon train for New York and hoped to see Mr. Brown, but whether I actually had a conference or not, I don't remember at this particular time.

Q. Well, I have no such letter, and isn't it a fact that

your best recollection now is that there was no such meeting held, either with Mr. Brown or any others in April, 1927, or is it the fact that you have no

recollection as to whether one was held or not?

A. I have no recollection that one was held. Mr. Brown, I remember, on one or more occasions when I called, was absent from his office. He probably did considerable traveling, like myself. The Certain-teed Products were manufacturing and selling other goods besides gypsum products.

Q. Now, you didn't take this trip that is referred to in the second paragraph of this letter, Exhibit 159, for the purpose of meeting Mr. Brown and these other gentlemen, did you, but the fact is that you went on other business for

your own company?

A. I would say that I did not make any special trip to meet Mr. Brown for the reason that there is nothing here to indicate that I had any date set for a conference. My business required me to make a trip as far as New York and Boston at least usually once every thirty days. We did quite a large business in New York City on gypsum partition blocks especially, and I would always meet the salesmen that I had in this territory, that is, we would meet in New York, and incidentally I called on several of my own customers while I was there. So I am sure that the meeting referred to here was not any special meeting, but simply the fact that I was going to New York, and if so, I would contact Mr. Brown.

Q. And you were going there to talk, if you could, to Mr. Brown in your own interest and not in Avery's

interest or on his behalf, were you?

A. No. it wasn't for Mr. Avery's interest, it was for my

own because of this merger proposition.

As I have stated before, I was very anxious to have this litigation done away with, it was a big stumbling block to me, and until it was settled definitely, I didn't know what I was getting into. But with the merger completed, and the license agreement entered into, that eliminated all questions, so that it apparently would be smooth sailing as far as litigation went.

Q. And in this same paragraph, in the fifth line from the end of it, the phrase "and Johnson and I will then sign up the other companies, which will make it 100%"-is again a reference to Martin Johnson, the Chicago man, and to

your proposed merger?

A. That had reference to Martin Johnson, and also to the proposed merger.

Q. Now yesterday, in answer to some questions from the Court, you were talking about plaster and bags. It is a fact, isn't it, that plaster is sold in paper bags, and that each bag holds one hundred pounds of plaster?

A That is true now, but in those days as I remember it, the paper bags held only eighty pounds of plaster originally. Later on, they got to making stronger bags and put

in one hundred pounds.

Q. And when the jute bag was used, for which you said a charge of ten cents was made, the jute bags likewise held eighty pounds as of the time that you were speaking?

A. No, the jute bags held one hundred pounds; they were

strong enough to carry that.

Q. So that if a ton of plaster was sold in jute bags, back in those days, there would be twenty jute bags to the ton.

A. That is right.

Q. And there was a charge made of ten cents per jute bag, as you remember it?

A. Yes, \$2 a ton.

Mr. BROMLEY. That is all.

Justice Stephens. Is there further cross-examination by counsel for other defendants?

Mr. FINCK. May we have just a minute, your Honor?

Justice Stephens. Yes, you may consult informally with your associates, if you wish.

Mr. FINCK. National will not cross-examine.

Justice Stephens. Cross-examination by any other defendant?

Mr. Johnston. No cross-examination by Texas.

Mr. ADAMS. None by Certain-teed.

Mr. O'DONNELL. None for Newark Plaster Company.

Mr. VARIAN. And no cross-examination by Ebsary.

Mr. ADAMS. I speak, in this case, for Celotex also.

Justice STEPHENS. Does that complete all of the defendants?

(No response:)

Justice STEPHENS. Redirect examination?

Mr. STEFFEN. May I have just a moment, your Honor?

Justice Stephens. Yes, certainly.

## REDIRECT EXAMINATION

By Mr. STEFFEN.

Q. I would like to refer the witness to Exhibit No. 136-B.

Justice STEPHENS. That is the letter of March 24, 1927, is it not?

Mr. STEFFEN. Yes.

By Mr. STEFFEN.

Q. The last sentence, Mr. Griswold, of the last paragraph. I think you testified that the words "our organization" there referred to the merger, is that correct?

A. That is my recollection, that they referred to the new merger, the company, or the organization which consisted of Mr. Martin Johnson, he would be included in it, and possible True and Webber, the financial people.

Q. Did your plans contemplate that the Certain-teed

Company would join that organization?

A. No, at no time did we include Certain-teed Products.

Mr. STEFFEN. We have no further questions.

Mr. BROMLEY. No questions.

Justice Stephens. May this witness then be ex-1123 cused from the trial?

## Mr. STEFFEN. Yes.

Justice STEPHENS. Apparently counsel have concluded their examinations, Mr. Griswold, and the Court thanks you for your patience in helping us in this case.

The WITNESS. And I thank the Court and all the attorneys on both sides for their consideration and courtesy.

(Witness excused.)

Mr. Steffen. I have got to make a short explanation concerning our next witness. Our next witness was to be Mr. Augustus Blagden: He appears with Mr. Griswold through these early years. He is a very important executive, engaged in war work, and while he has been under subpoens and was to come here on the 15th, we have successively, at his request, excused him, and we wanted, in view of hotel-reservation problems and travel restrictions, and his war work, to cut this as closely as we could so that we could bring him here and put him directly on the stand. The other wit-

nesses that we have subpoenaed are from Georgia and from distant parts; he comes from Elizabeth, New Jersey, and we are faced with a situation now that we can't get him, can't get in touch with him and get him here, certainly not this afternoon and probably not tomorrow.

We would like to have, therefore, a recess until Monday.

Justice STEPHENS. Have you any other witnesses that you could put on?

Mr. STEFFEN. No, we have not. I regret exceedingly that this has come up, and it will not come up again.

Justice STEPHENS. Have you any exhibits you could put in or any way in which we could use the time?

Mr. STEFFEN. No, your Honor.

Justice Stephens. Wouldn't it be possible, by telegraph or telephone, to get Mr. Blagden here tomorrow?

Mr. STEFFEN. We will make every effort, and if you will recess until tomorrow morning we will do what we can. Already we have wired him and telephoned, and we have a message from his secretary saying he is out on the road, on a trip, and that she will get in touch with him—this is a wire from her to Mr. Berge—and if possible, get him back; but he is not expected back until Thursday.

Justice Jackson. Is he going to be a long witness?

Mr. STEFFEN. He will be about a day.

Justice Jackson. Tomorrow is going to be a short day anyway, and you probably wouldn't finish with him in one day even if you could get him here.

Mr. STEFFEN. That is right.

Justice STEPHENS. Well, the Court realizes that these things happen. We hope you will guard against it as much as possible, because we do want to make as much progress as we can while we are in session. But the Court will, in view of the exigency in which the Government finds

itself, and tomorrow being a short day in any event, adjourn until next Monday at ten o'clock.

# MOTION FOR CORRECTION OF RECORD

Mr. Steffen. I would like to make just one motion at this time, and I do that with some misgivings, but I think

it is essential from the Government's standpoint for purposes of preserving our record. I would like to read it and

then I will file copies in the usual way.

The motion is a motion for correction of the record: "Comes now Roscoe T. Steffen, and upon his affidavit annexed hereto, and prayed to be considered as a part hereof, and upon all the proceedings herein, hereby respectfully moves this Court to make its opinion upon defendant's motion to strike, etc., paragraph 46a of the complaint, a part of the record in this proceeding, and, further, to modify its said opinion, or to take such other appropriate action as the Court may deem proper, to conform its opinion to the fact that the Government did not concede either in its brief or upon the oral argument as recited in the opinion (transcript, p. 691) that the question before the Court was whether the Commissioner of Patents had erred in issuing the five Roos patents mentioned in paragraph 46a of the complaint."

I have an affidavit supporting that, which I will simply file, which goes merely to the fact, as I understand it—

Justice Stephens (interposing). Read the affidavit so that the Court will be advised of its contents.

1126 Mr. STEFFEN (reading:)

"Roscoe T. Steffen, being duly sworn, deposes and

says:

"As counsel for the Government, I presented the argument on October 18, 1943, in opposition to the defendants' motion to strike or in the alternative for partial judgment upon paragraph 46a of the complaint and, with Edward Knuff, Esq., I prepared the Government's brief filed with the Court on that date."

"I have carefully examined the transcript of the argument (Tr. Oct. 18, 1943, pp. 539 to 661) and can truthfully say that at no place in the brief or in the oral argument or otherwise did the Government concede, as stated in the majority opinion, that the question before the Court was whether the Commissioner of Patents had erred in issuing the five Roos patents named in paragraph 46a.

"The question briefed and argued by the Government (Brief p. 6) was whether the plaintiff might introduce evidence in an antitrust proceeding to show that one or more of the five named patents is invalid upon all or any of the grounds stated in paragraph 46a.

"The Court's attention is respectfully invited to the fact that the Government at no place discussed the propriety of the Commissioner's ruling, or suggested that any action of his should be reviewed. The burden of the argument was that the validity of a patent is not a matter of discretion

for the Commissioner to decide but of strict compliance with statute; that a patent regularly and prop-

erly issued by the Commissioner may nevertheless not comply with the statute and may be invalid because of facts which the Commissioner did not know and in the nature of the case could not find out (Tr., Oct. 18, 1943, pp. 604-606); and, that the courts, when shown such facts in a proper case, have consistently refused to regard the patents to which such facts pertain as being valid and subsisting grants (Trial Brief, pp. 47 to 49)."

I would present that as a motion and ask the Court to

rule upon it.

Justice STEPHENS. It may be presented and filed as a part of the record. The opinion has already been made a part of the transcript of the testimony, on the order of the Court.

## Mr. STEFFEN. I see.

Justice STEPHENS. Have you anything to say on this subject, gentlemen for the defendants? If you have not, the Court will make a statement.

Mr. Bromley. No. sir, I haven't anything.

Justice STEPHENS. The understanding of the Court in respect to the matter now at issue is this, that the Court stated in its opinion which now appears at page 691 of the transcript:

"It is also to be borne in mind that, while this is not an independent cancelation proceeding, but anti-trust suit in which the Government contends that the patents are invalid,

nevertheless the Government is seeking a judicial determination that the Patent Office erred in issuing the patents and that they are for that reason invalid. This was conceded in the oral argument."

Is that the statement to which you object?

Mr. Steffen. That is the part that bothered me, your Honor.

Justice STEPHENS. The statement of the Court was based

upon a number of considerations.

It was the impression of the Court at the time of the argument, and after very careful consideration of the Government's brief, that the contention of the Government was, not that the patents had been obtained by any fraud or wrongful act or over-reaching of the Government but that they had been issued by the Patent Office as a result of erroneous judgment in respect of the matters set forth in

paragraph 46 (a) of the complaint.

The Court calls attention to the fact that in paragraph 46 (a) of the complaint—and the Court I think mentioned that in the opinion—there was nothing stated about fraud, that all of the allegations concerning the alleged invalidity of the patents had to do with considerations not touching fraud or over-reaching, but touching erroneous action on the part of the Patent Office, to-wit: that there was no real invention, or novelty; that the claims disclosed no patentable invention in view of the prior art; that the alleged in-

ventions described in the claims were shown and described in printed publications in the United States more than two years prior to the filing of the respective applications; that the alleged inventions described in the claims of the patents are inoperative and devoid of novelty or utility; that the alleged inventions described in the claims of said patents were abandoned by the inventor and he was guilty of laches before the respective applications were filed; that the alleged inventions described in the claims of the patents were not reduced to practice until after other inventors had invented and reduced the same to practice and applied for patents thereon; that the alleged inventions are described in ambiguous and not in properly clear, concise and exact terms; and, finally, that the defendants have been informed of the invalidity of the claims of the said patents and have unreasonably failed to file in the United States Patent Office any disclaimer of said

Now, the understanding of the Court of the oral argument and of the brief, which was very carefully examined, including a very careful examination of the authorities, was that the Government was asserting that the Patent Office had erred for the reasons set out in paragraph 46 (a), in issuing these patents, and that an issue, therefore, was presented such as would be presented in an infringement proceeding where no fraud in the obtaining of the patents was charged.

The Court's impression was in part based upon the statement in the brief of the Government at page 19,

1130 where the Government states:

claims.

"Needless to say the authorities cited by the defendants do not support their argument. The first United



States v. American Bell Telephone Co., (1897) 167 U. S. 224, has already been considered; it held simply that, apart from statute, the United States may cancel or set aside a

patent for fraud, a matter not now in issue here."

It is that phrase in particular, "a matter not now in issue here" used in respect of the Government's distinction of the case of United States v. American Bell Telephone Company, from which the Court among other things, got the understanding of the Government's argument which it did. It will be remembered that the case which I have just referred to—and this is explained in the opinion—was a case in which the Government sought, in a direct cancelation proceeding, to cancel the Berliner telephone transmitter patent, on two grounds: first, that it had been obtained by fraud, or fraudulent delay in the proceedings; and, second, that the Patent Office had erred in issuing the patent because it was the same as a previous telephone-receiver patent.

The Court calls attention to the fact that in the transcript of the oral argument at page 607, Mr. Steffen said, in answer to a question by Judge Garrett, beginning at line 23

and running over to the next page:

"I might point out, Judge Garrett, that the other ground is that we are not proceeding on any question 1131 of fraud, which was granted in the American Bell Telephone case as being a proper means of proceed-

ing."

The Court calls attention also to the fact that nowhere in the complaint of the Government is it charged that the patents were obtained by fraud or over-reaching. It is the Court's view that the contentions now made by Government's counsel are contentions not based upon a misstatement by the Court, as the Government asserts, of its position, but upon a different interpretation which the Government puts upon its own argument than that which the Court put upon it.

It is the view of the Court that there are two general classifications of attack, or categories of attack, upon the proceedings in the Patent Office—attack for action obtained by fraud, or attack for action taken quite beyond the jurisdiction, or action taken arbitrarily, on the one hand; and on the other hand, attacks such as arise in infringement cases for erroneous exercise of the discretion or judgment of the Patent Office in respect of issuing a patent

of the Patent Office in respect of issuing a patent.

It was the clear understanding of the Court, and the Court thinks its understanding was correct, that the Government was dealing with the second category, and not

the first, and that that was made perfectly clear to the Court in the oral argument and in the brief.

In the statement just completed by the Presiding Judge, the Presiding Judge is authorized to say that both

1132 Judges Garrett and Jackson agree.

The motion, therefore, to correct the record is denied, with a proper exception noted to Mr. Steffen for the Government.

Mr. STEFFEN. May I make just one brief notation for the record at this point?

Justice STEPHENS. Yes.

Mr. STEFFEN. That is, that while we stated that there was no fraud involved in paragraph 46 (a), we did not want to be understood as saying there was no fraud in the general case, but on the pleadings as they had been presented to your Honor, there was no question of fraud as you correctly state.

I would like to say one other thing, that our argument was that there were three categories, one of fraud, one of failure on the part of the Patent Office as an administrative office, and thirdly, where the Patent Office made no failure, but couldn't, because of invention elsewhere or prior art elsewhere, know whether or not the patent was properly issued.

Justice STEPHENS. That point was also commented upon in the Court's opinion, and I think sufficiently not to require additional statement.

The adjournment may be taken until next Monday at ten o'clock. (The Marshal announced the adjournment.)

1133 We will now adjourn until next Monday at ten o'clock.

(Whereupon, at 12:10 o'clock p.m., the proceedings were adjourned until Monday, November 29, 1943, at 10:00 o'clock a.m.)

In the District Court of the United States for the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COM-PANY, INC.: NEWARK PLASTER COMPANY: SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHL-BERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING. Washington, D. C., Monday, November 29, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted).

My clerk calls my attention to the fact that although the Opinion of the Court on the motion to strike Paragraph 46(a) had been copied into the transcript, there is nothing in the record indicating that it was ordered to be put into the transcript. That order is made.

The Court has given some attention during the recess to the affidavit and motion filed by Government's counsel, and may have something to say in writing on the subject

of that affidavit and motion later.

At the moment, the Court will say only this, that the affidavit and motion seems to charge the Court with a misstatement or misapprehension of the Government's position in its oral argument and brief on the motion to strike Paragraph 46(a). As the record now stands, there would be nothing in the record from which an appellate tribunal, should this case ultimately go against the Government and an appea be predicated in part upon that point, could determine whether or not the Court had correctly stated or apprehended the Government's brief and oral argument, because the brief is not a part of the record. The opinion is a part of the record, and there is now a part of the rec-

ord an affidavit and motion charging that the Government's argument has been misstated or misapprehended. The Court thinks, in fairness to the Court therefore, that the brief of the Government in opposition to the motion to strike Paragraph 46(a) should be made a part of the record. The Court regrets to add the expense to the record of printing that in the record, but it seems that if a point is to be made, as is apparently intended by Government's counsel, in the event of an appeal, should this case go against the Government, of the asserted misstatement, that the appellate tribunal should have before it the whole of the proceedings which are pertinent to that assertion.

Therefore, the Court will order the Government's brief submitted in opposition to the motion to strike Paragraph 46(a), also made a part of the transcript of record in this case, and it may be obtained from me at the reporter's con-

venience.

(The Government's Memorandum in Opposition to Defendants' Motion to Strike Paragraph 46a of the Complaint is as follows:)

1138 In the District Court of the United States for the District of Columbia

Civil Action No. 8017

United States of America, plaintiff,

United States Gypsum Company, et al., defendants. Memorandum in opposition to defendants' motion to strike paragraph 46a of the complaint

#### PRELIMINARY STATEMENT

The complaint in this action was filed on August 15, 1940. In November 18, 1940, the defendants, by motion, asked for an order directing the plaintiff to file a more definite statement and on May 15, 1941, the plaintiff filed its bill of particulars. Thereafter, on August 1, 1941, the defendants filed their answers.

On October 15, 1942, the defendants were granted leave to amend in order to set up two supplemental answers alleging that on November 19, 1941, a verdict was directed for certain of the defendants in *United States* v. *United* 

States Gypsum Company, et al., (Criminal No. 1139 66008). Thereafter, on or about November 16, 1942,

each of the defendants moved for summary judgment upon the ground that the matters pleaded in their supplemental answers were res adjudicata of the present action. The Court, on August 10, 1943, denied defendants'

motion and set the case down for trial on November 15, 1943.

In the meantime, and on February 24, 1943, plaintiff filed its motion for leave to amend the complaint by adding paragraph 46(a) by which it is alleged that certain patents owned by the United States Gypsum Company and used by it as the basis for fixing prices of gypsum board are invalid and void. Plaintiff's motion was granted on March 12, 1943, without prejudice to the defendants to move in writing for a bill of particulars. On August 16, 1943, the defendants filed a motion for a bill of particulars and its disposition is now pending.

On August 10, 1943, at the suggestion of the Court, counsel for the defendants undertook to file a motion to strike paragraph 46(a) of the complaint upon the ground that the Government is estopped to offer any evidence at the trial showing the invalidity of the defendants' patents. The Court set October 18, 1943, as the day to hear argument on the defendants' motion, if and when filed.

On September 28, 1943, the defendants served a motion to strike paragraph 46(a) of the complaint or, in the alternative, for partial judgment on the issue framed by that paragraph and paragraph 35 of the U.S. G.

that paragraph and paragraph 35 of the U.S. G. answer. The plaintiff, on October 4, 1943, filed its opposition to this motion.

## ANALYSIS OF THE PLEADINGS

The complaint in this case alleges that the defendants are engaged in a combination in restraint of trade in the manufacture and sale of gypsum board and other gypsum products throughout the territory east of the Rocky Hountains. Specifically it is charged, in paragraph 44 that the defendants have violated Secs. 1, 2, and 3 of the Terman Act. It is further alleged, in paragraph 46, that the said combination is being carried out in part under the guise of numerous patent license agreements which "are not bona fide patent license agreements reasonably designed to secure to U. S. G. the pecuniary rewards for valid patent monopolies. . . ."

The nature of the restraints with which defendants are charged is described in part in paragraph 45 of the complaint. Briefly stated, it is there alleged that the defendants have combined (1) to fix arbitrary and non-competitive prices for the sale of gypsum products, (2) to standardize the products which they manufacture, (3) to control distribution, for example, by eliminating sales to jobbers, and

(4) to require manufacturing distributors upon resale of products purchased from the defendants to conform to arbitrary and non-competitive prices set by the defendants.

Each of the defendants has in its answer formally denied the matters so charged in the complaint. At the 1141 same time, counsel for the defendants have admitted in argument before this Court (Transcript, October

15, 1942, pp. 34, 152) that, since 1929, the defendant, United States Gypsum Company has arbitrarily set the price at which the defendants have sold gypsum board. The defendants, moreover, have admitted going to considerable lengths to police the industry in order to make sure that uniform prices and conditions of sale were being maintained. (Transcript, October 15, 1942, p. 152). Next, it has been admitted (Transcript, October 15, 1942, p. 153) that beginning in 1929 the defendants adopted a royalty provision requiring payment based on both patented and unpatented board. The purpose of this provision was to drive open-edge unpatented board from the market and standardize production. (See, 3rd Whereas, May, 1929, license agreements, complaint p. 48.) Moreover, it is admitted that jobbers were virtually eliminated from the industry in about the year 1932 when U.S. G. fixed identical prices for sales to jobbers and dealers. (See Answers to paragraph 95 of the complaint. Transcript, March 11. 1943, p. 207.) And, finally, while defendants have not admitted that they have controlled the resale prices charged by manufacturing distributors, there is no doubt that such prices have conformed to the defendants' prices throughout.

It is submitted that this showing makes out a violation of the Sherman Act. Defendants admit to having combined to control the manufacture, sale, and distribution of gypsum products in interstate commerce. United States v. Standard Sanitary Mfg. Co. (1912)

merce. United States v. Standard Sanitary Mfg. Co. (1912) 226 U.S. 20. Nothing is better settled than that a combination to fix prices is alone and per se a violation of the Act, regardless of whether the prices so fixed might be fair or equitable. As said by Mr. Justice Douglas in United States v. Masonite Corp., et al., (1942) 316 U.S. 265 at p. 276:

"Prices are fixed when they are agreed upon. United States v. Socony-Vacuum Oil Co., supra, . . . p. 222. The fixing of prices by one member of a group pursuant to express delegation, acquiescence, or understanding is just as illegal as the fixing of prices by direct, joint action. Id. Since there was price-fixing, the fact that there were business reasons which made the arrangements desirable to the

appellees, the fact that the effect of the combination may have been to increase the distribution of hardboard without increase of price to the consumer or even to promote competition between dealers, or the fact that from other points of view the arrangements might be deemed to have desirable consequences would be no more a legal justification for pricefixing than were the 'competitive evils' in the Socony-Vacuum case."

By way of confession and avoidance, the defendant U.S.G., in paragraph 35 of its answer, has sought to justify this restraint by alleging affirmatively that it operates under the protection of "valid patent monopolies."

The court construed defendants' patent pleading as "one in confession and avoidance" in United States v. Motion Picture Patents Co. (1915) 225 Fed. 800 at 803. Its alleged right to fix prices is averred to be "an entirely proper and legal restriction within the purview of the patent laws and the decisions of the Supreme Court." The licensee-defendants have more or less tacitly rested their

defense in part on the same averment.

The principal decision upon which the defendants must rely to support this pleading is United States v. General Electric Co. et al. (1926) 272 U.S. 476. It is submitted that the defendants are afforded no protection by that decision for several reasons, principally because the court there had no charge before it that the entire industry was being controlled under the guise of patent license agreements, as is the charge here. But, aside from this, it is submitted that, in order to bring themselves within such protection as the General Electric case affords, the defendants must show affirmatively:

"1. That they have valid patents completely covering modern gypsum board;

"2. That in fact the board made by them and controlled. by the license agreements is covered by their patents; and,

"3. That the price fixing and other restraints imposed by their license agreements are a reasonable exercise of rights

conferred by their patent monopolies."

Upon this analysis, no affirmative pleading by the plaintiff to deny the validity of defendants' patents was necessary. Rule 7, Federal Rules of Civil Procedure. In order to marrow the issues, however, and to avoid surprise at the trial (Transcript, March 12, 1943, pp. 358-62), the plaintiff was permitted to amend its complaint by adding paragraph 46(a), designating the particular patents whose validity it-proposed to challenge at the trial, and the

grounds upon which such patents are asserted to be invalid.

Paragraph 46(a) reads as follows:

"46a. Many of the patents mentioned and described in said license agreements by which the said combination has been, and is being carried out in part, are process or machine patents. The article and product claims of Roos patents No. 2,017,022, No. 2,079,338, No. 2,080,009, No. 1,914,345, and No. 1,938,354 mentioned and described in said license agreements, and said patents, are each invalid and void for each of the following reasons: (a) there is no real invention or novelty in the claims of said patents; (b) the claims of said patents disclose no patentable invention in view of the prior art at the time the respective applications were filed; (c) the alleged inventions described in the claims of said patents were shown and described in printed publications in the United States more than two

years prior to the filing of the respective applications; (d) the alleged inventions described in the

claims of said patents are inoperative and devoid of novelty or utility; (e) the alleged inventions described in the claims of said patents were abandoned by the inventor and he was guilty of laches before the respective applications were filed; (f) the alleged inventions described in the claims of said patents were not reduced to practice until after other inventors had invented and reduced the same to practice and applied for patents thereon; (g) the said alleged inventions are described in ambiguous and not in properly clear, concise and exact terms and; (h) the defendants have been informed of the invalidity of the claims of the said patents and have unreasonably failed to file in the United States Patent Office any disclaimer of such claims. The said patents mentioned and described in the said license agreements, even assuming they are valid, are not basic article or product patents and do not singly or all together cover completely the business of mining and selling gypsum, or cover completely gypsum board, which is one of the forms in which unpatented gypsum is sold by the defendants, but at most constitute minor additions to the established and unpatented art of making gypsum board and afford no legal justification for the said combination."

Whether this pleading of the patent validity issue is proper under Rule 7, Federal Rules of Civil Procedure, and,

e secondly, whether the plaintiff or the defendant has the burden on the issues raised, are questions being separately briefed in connection with defendants

motion for a bill of particulars filed August 16, 1943.

The board question here presented is whether the plaintiff may introduce any evidence in an antitrust proceeding to show that one or more of the five patents named in paragraph 46a is invalid upon all or any of the grounds stated.

Before taking up the legal argument, certain observations may be made to clarify the question. In the first place it is the plaintiff's contention that, as a matter of substantive law, the defendants can only claim such protection as the General Electric case affords them if, in fact, their patents are valid article patents covering the products which they sell under their license agreements. This would seem to be a self-evident proposition. Certainly the court in the General Electric case assumed that the patents before it were valid.

In further support of the basic proposition that, as a substantive matter, invalid patents will not support the practices sanctioned in the General Electric case, the court is referred to the recent decision of the Supreme Court in Sola Electric Co. v. Jefferson Electric Co. (1942) 317 U.S. 173. That was a suit by licensor v. licensee to recover royalties and to require the licensee to sell only in conformity

with a general price-fixing scheme existing between the licensor and its several licensees, similar to that

obtaining in this case. The lower court held that the defendant, as licensee, was estopped by contract to question the validity of plaintiff's patents and, hence, to question the legality of the plaintiff's price-fixing agreement under

the Sherman Act.

It will be noted first that this was not an infringement suit, where one recognized means of testing patent validity has been established, but an ordinary suit for breach of contract. Secondly, and of fully as great significance here, is the reason assigned by the court for granting certiorari, namely, that the question is one "of importance to the administration of the patent laws and the Sherman Anti-Trust Act." Finally, the holding, that the defendant might show the invalidity of the plaintiff's patents in order to make out a violation of the Sherman Act, and then to invalidate the plaintiff's contract, would seem to set at rest any question whether a price-fixing scheme in restraint of trade can be based on invalid patents. It is clear that only valid patents will suffice.

The noteworthy feature of the Sola Electric Co. case is the stress which the court put on the public interest involved, even although the action was merely a private one. In such circumstances it held ordinary rules of estoppel must give way. As the matter was stated by Chief Justice

Stone at p. 177:

the public as well as the petitioner the burden of an agreement in violation of the Sherman Act must yield to the Act's declaration that such agreements are unlawful, and to the public policy of the Act which in the public interest precludes the enforcement of such unlawful agreements. Cf. Morton Salt Co. v. Suppiger Co., 314 U. S. 488, 492-93."

It may be assumed that the defendants do not challenge the foregoing propositions in principle. They rest their case on the narrow ground that the Government stands in a different position and, having issued the patents, that it cannot now be heard to question their validity, even in an antitrust proceeding. In other words, the defendants' case comes down to the blunt proposition that, even although their patents are not worth the paper they are written on, and would not afford any justification for their actions if the true facts could be shown, they will nonetheless suffice to justify an otherwise illegal and continuing control of the gypsum industry.

The wholly artificial character of the defendants' position is made more apparent when the general license agreements are examined. It is there provided that the "licensee hereby acknowledges the validity of the Letters Patent, granted and to be granted, forming the subject-matter of this license." (May, 1929, license agreement, page 53 of com-

plaint. Also, see complaint, pp. 75, 117, 125.) The 1149 net effect of these provisions is that all the makers of gypsum board in the territory east of the Rocky Mountains have agreed not to test the validity of the patents named in the license agreements. (See admissions of defense counsel, Transcript, October 15, 1942, pp. 154-5). On the one hand they contend that the Government can not test validity; on the other, they bind themselves not to

raise the question.

Of the many patents listed in the various license agreements, it is submitted the five named in paragraph 46a are the principal if not the only, article patents upon which the defendants can at all rely to justify their price-fixing combination. They are, respectively, the three Roos "foam process" patents, Nos. 2,017,022, 2,079,338, 2,080,009; the "metalized board" patent No. 1,914,345; and, the "perforated lath" patent, No. 1,938,354. The first three of these were merely in application form at the time the October, 1929,

license agreements were signed and were not issued for

several years thereafter.

It is admitted in the pleadings (Answers to complaint, par. 120) that the validity of one of these five patents, No. 1,938,354, has never been litigated in court. It is a fact, tacitly admitted by defense counsel, that the validity of the three Roos "foam process" patents has never been tested in court. (Transcript, October 15, 1942, pp. 160-

162). Moreover, it is fair to say in view of the self-imposed restrictive clauses in the license agreements, that in all probability none of these patents will ever be tested by an infringement suit. Certainly not by these defendants, and they have been the only makers of gypsum board in the territory east of the Rocky Mountains since 1929. (See answers to complaint, par. 20).

The narrow question presented, therefore, is whether the Government, in the enforcement of the antitrust laws, can be estopped to question the validity of the defendants' patents, where the defendants themselves have combined to prevent

a usual and normal test of their validity.

#### SUMMARY OF ARGUMENT

The broad proposition which the plaintiff maintains here may be stated as follows: The Government may introduce evidence in an antitrust proceeding directed against an alleged price-fixing combination in restraint of trade to show that patent licensing agreements, pleaded by the defendants as an affirmative defense, are based upon invalid patents, and hence constitute no defense, particularly where the defendants have themselves combined to prevent a test of their validity by infringement suits.

In the argument to follow it will be convenient to discuss under separate headings the principal grounds upon which the plaintiff's contention is based. These may be stated as

follows:

1151"1. The Government in an antitrust suit acts in its sovereign capacity pursuant to Congressional mandate and is not subject to local rules of estoppel.

2. The present proceeding is not a collateral attack to set aside or to nullify the defendants' patents, but is a direct attack upon the defendants' price-fixing activities, in which the fact of the invalidity of the defendants' patents may be shown.

3. Patents for inventions are merely prima facie valid, and the courts have always permitted a party in a proper oase to show their actual invalidity in the respects mentioned in paragraph 46(a) of the complaint.

4. Assuming that in an ordinary antitrust proceeding the Government would be estopped to question the validity of the defendants' patents, nevertheless, on the facts of this case, the defendants are themselves estopped to insist upon the point.

ARGUMENT

#### Point I

The Government in an antitrust suit acts in its sovereign capacity pursuant to Congressional mandate and is not subject to local rules of estoppel.

The most essential point to be made in this discussion is that the present proceeding was instituted by the Attorney

General to make effective a Congressionally declared 1152 policy to provide a free and competitive market for goods. It is not a private litigation. It is not instituted to favor one individual at the expense of another. It is an action to enjoin monopoly and restraints of trade in the gypsum industry. In bringing such a suit, the Government acts in its sovereign capacity for the public welfare.

The condemnation of restraints of trade and monopoly is very old in our law. It has been more than 300 years, in fact, since the English crown lost its asserted right to grant to favored persons, in aid of the royal exchequer, the exclusive right to manufacture and sell goods in England. This bit of English history leading up to the passage of the Statute of Monopolies (21 Jac. 1, ch. 3) in 1623 is adequately reviewed in Walker, Patents (Deller's Ed., 1937) pp. 1-16.

Nor are the reasons for this hostility hard to find. They were fully stated in *Darcy* v. *Allen* (1602) 11 Coke, R. 84-b, where the court, in holding void a monopoly to manufacture playing cards within the realm as being contrary to the

"common-law" said in part:

"And therefore there are three inseparable incidents to every monopoly against the commonwealth; that the price of the same commodity will be raised, for he who has the sole selling of any commodity may and will make the price as he pleases; that after the monopoly granted the

commodity is not so good and merchantable as it was 1153 before, for the patentee, having the sole trade, re-

gards only his private benefit and not the commonwealth; and that it tends to the impoverishment of divers artificers, and others, who before, by the labor of their hands in their art or trade, had maintained themselves and their families, who now will of necessity be restrained to live in idleness and beggary." From almost the beginning an exception was made, however, in favor of the actual inventor. As stated by the court in the case of *The Clothworkers of Ipswich* (1615) Godbolt 252:

"But if a man hath brought in a new invention and a new trade within the kingdom, in peril of his life, and consumption of his estate and stock, etc., or if a man hath made a new discovery of anything, in such cases the King, of his grace and favour, in recompence of his costs and travail, may grant by charter unto him, that he only shall use such trade or trafique for a certain time, because at first the people of the kingdom are ignorant, and have not the knowledge or skill to use it ..."

Very briefly stated these cases contain the germ of our present law. The colonies inherited an even more lively distrust of monopolies than prevailed in the mother country. See Hamilton, *Patents and Free Enterprise* (1941) Monograph 31, T.N.E.C. pp. 18-27. At the same time

there seems to have been full approval of the Constitutional provision giving Congress power "to promote the progress of science and useful arts" by giving exclusive rights to writers and inventors for limited-

times.

Though patent laws were one of the early concerns of Congress, it was not until 1890 that serious attention was given to the large scale trusts and combinations then operating in interstate commerce. The Congress at that time passed the Sherman Act, not so much to make monopolies and restraints of trade illegal, as to give the Federal Courts jurisdiction to declare them illegal according to the common law. Congressional purpose was stated by Senator Hoar as follows:

"The common law in the States of the Union of course extends over citizens and subjects over which the State itself has jurisdiction. Now we are dealing with an offense against interstate or international commerce, which the state cannot regulate by penal enactment, and we find the United States without any common law. The great thing that this bill does, except affording a remedy, is to extend the common-law principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the United States. 21 Cong. R. 3152 (1890)."

By the terms of the Sherman Act, 26 Stat. 209; 15 U.S. C.A. 4, not only are the Federal courts given jurisdiction to prevent and restrain violations of the Act, but "it shall

be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restain such violations."

Against this background, it is submitted that two things are obvious. In the first place there can be no question that the present action is brought by the United States in its proprietary or sovereign capacity. It is not a private litigation. In the second place, it is apparent that monopolies generally are prohibited; valid patent monopolies for limited times are permitted only as an exception in order to promote the progress of science and the useful arts. See Standard Oil Co. v. United States (1911) 221 U.S. 1; United States v. Standard Sanitary Mfg. Co. (1912) 226 U.S. 20.

At no place is it so much as intimated that the United States might be estopped in the enforcement of its antitrust laws by the existence of *invalid* patents. In fact the justification for the patent monopoly has always assumed validity as a matter beyond question. One of the most quoted rationalizations in justification of making an exception in favor of the patent monopoly, was stated by the court

in Allen v. Hunter, (1855) 6 McLean 303, 305, 306:

"Patentees are not monopolists. This objection is often made and it has its effect upon society. The imputation is unjust and impolitic. A monopolist is one who by the exercise of the sovereign power takes from the public

that which belongs to it, and gives to the grantee and

his assigns an exclusive use. On this ground monopolies are justly odious. It enables a favored individual to tax the community for his exclusive benefit, for the use of that to which every other person in the community, abstractly, has an equal right with himself. Under the patent law this can never be done. No exclusive right can be granted for anything which the patentee has not invented or discovered. If he claims anything which was known before, his patent is void. So that the law repudiates a monopoly." (Emphasis supplied.)

May the United States nevertheless be estopped in an antitrust proceeding to show the true facts? The question was elaborately examined in the series of Bell Telephone Company cases ending with United States v. American Bell Telephone Company (1897) 167 U. S. 224, and, it is submitted, answered in the negative. In the latter case the United States sought to set aside a patent upon the ground that it had been wrongly issued: particularly (1) in

that there had been a delay of some 11 years in the Patent Office, which was charged as being a fraud on the public; and (2) in that the patent in suit was said to be covered by a prior patent issued to the same inventor.

While the court found upon the merits that no fraud had been shown, it reaffirmed in positive terms the right of the

United States to bring an action to cancel a patent in such circumstances. The language of Mr. Justice Brewer at pp. 264-5 is very pertinent to this case:

"Suits may be maintained by the Government in its own courts to set aside one of its patents not only when it has a proprietary and pecuniary interest in the result, but also when it is necessary in order to enable it to discharge its obligations to the public, and sometimes when the purpose and effect are simply to enforce the rights of an individual. In the former cases it has all the privileges and rights of a sovereign. The statutes of limitation do not run against it. The laches of its own officials does not debar its right. Van Brocklin'v. Tennessee, 117 U.S. 151; United States v. Nashville, Chattanooga &c. Railway, 118 U.S. 120; United States v. Insley, 130 U.S. 263. But when it has no proprietary or pecuniary result in the setting aside of the patent; is not seeking to discharge its obligations to the public; when it has brought the suit simply to help an individual; making itself, as it were, the instrument by which the right of that individual against the patentee can be established, then it becomes subject to the rules governing like suits between private litigants." (Emphasis supplied.)

The court was equally clear that the Attorney General had no authority, by statute or according to the common law, to bring an action to set aside a patent upon the bare allega-

tion that in his opinion the Patent Office had failed 1158 to give proper weight to a prior patent. While fully

affirming its prior ruling in *United States* v. American Bell Telephone Co. (1888) 128 U.S. 315, 373, that Sec. 4920, Rev. Stat. had no bearing on the problem where the

issue was fraud, the court went on to say, at p. 269:

"It was not affirmed that proof of any fraud, or deceit, or the existence of any error on the part of the officers as to the extent of their power, or that any mistake in the instrument was sufficient to justify a decree of cancellation. Least of all was it intended to be affirmed that the courts of the United States sitting as courts of equity, could entertain jurisdiction of a suit by the United States to set aside a patent for an invention on the mere ground of error of judgment on the part of the patent officials. That would be an attempt on the part of the courts in collateral attack to exercise an appellate jurisdiction over the decisions of the Patent Office, although no appellate jurisdiction has been

by the statutes conferred."

It is obvious that the present action is in no sense an attempt by the Attorney General to set up an appellate jurisdiction over the Patent Office. In the first place, the present complaint does not ask to have the defendants' patents cancelled or set aside. The defendants may keep their patents for what they are worth. In the second place, as

pointed out above, the Attorney General here proceeds in accordance with explicit Congressional au-

thority and direction to enforce the antitrust laws. The case, therefore, falls in the same category with the fraud proceedings in the *Telephone Company* cases; in both the Government acts in its sovereign capacity for the public welfare and cannot be estopped by ruled obtaining between private litigants.

There have not been many cases squarely on the point. In the first which we have found, *United States* v. *Porcelain Appliance Corporation*, et al. (U.S. D.C. N.D. Ohio, E. Div., Sept. 9, 1926) (unreported) the court affirmed the right of the Government to introduce evidence of patent invalidity in an antitrust suit. Judge Westenhaver, in ruling on a mo-

tion, said:

"Obviously, this is not a suit by the United States to cancel patents. It is probably beyond the scope of all possible issues to decree certain patents or certain claims thereof to be void. The issue here is whether or not the defendants have organized and are members of an illegal conspiracy and a final decree can probably not have any broader scope. These expressions are not to be taken as the final determination of any such question. However, assuming they correctly state the law, it would still appear that the allegations of the bill are proper and that the testimony in support thereof might be received . . . I can perceive many combinations, in violation of the Sherman antitrust

1160 law, in which patents or claims thereof, invalid in view of prior art, or limited in nature, may be wrongfully used in building up or maintaining such an

illegal conspiracy . . ."

Shortly after this in the "Oil Cracking Case," United States v. Standard Oil Co., et al. (1929) 33 F. (2d) 617, reversed on other grounds, 283 U. S. 163 (1931), the question was again presented. There the petition alleged a conspiracy to restrain trade and commerce in gasoline by



means of a pool of patents covering the cracking process and a cross-licensing system. It was further averred that there was no basic patent covering the process of manufacturing gasoline by the application of heat under superatmospheric pressure, and that the minor patents, if valid at all, constituted no improvement or but slight improvement in the art. The defendants denied that there were no valid patents covering the basic feature.

The Government offered in evidence two patents to show that certain of the defendants' patents were anticipated and to show that defendants' patents were granted through error or mistake on the part of the Patent Examiner. There was an objection to this offer. Counsel for the Government and for the defendants then made statements in order to present to the Court the question of whether this type of evidence was admissible. The Master said (Supreme Court Record,

October Term, 1930, vol. 34, p. 411):

"The main question is to get this fairly before the court for decision, in all its aspects—as to whether the Government has a right to attack either the validity or the scope of these Letters Patent and whether this attack is collateral or whether it is direct. . .

Among the objections made by the defendants, both to the competency and admissibility of the two patents, were the following: (1) that there was no allegation in the petition that the two particular patents attacked or any of the patens owned by the defendants were invalid and that there was, therefore, no issue of validity under the pleadings; (2) that there was no allegation that the scope of the patents was narrower than appeared on the face of the patents; (3) that any attack either upon the validity or the scope of the patents was collateral to the issue involved in the case; (4) that the Government as grantor of the two patents attacked and of the other patents owned by defendants, was estopped to deny their validity in the proceedings; (5) that in a proceeding under the Sherman Antitrust law the validity and scope of the patents owned by the defendants was not in issue.

These questions were thereupon certified to the District Court for a decision and, upon argument, its order was as

follows:

"The Master having certified questions to this Court respecting the admission of evidence, and this Court, having heard counsel and being fully advised, is of the opinion that the objections should be over-ruled and the evidence received." (Supreme Court Record, supra. pp. 423-4.)

In making this ruling that the evidence was admissible, the District Court made no distinction as to whether the evidence was to be received for the purpose of questioning the validity of the patents or in order to limit their scope. It should be noted, however, that the defendants were overruled on all their objections, some of which were based solely on the argument that the Government could not at-

tack validity.

In the further proceedings before the Master the latter came to the conclusion not only that evidence to show the invalidity of defendants' patents should be excluded, but that it was not permissible for the Government to introduce evidence to show their proper scope. That is, in the Master's opinion the patents must be assumed to be valid and their claims must stand as they read when issued by the Patent Office. This was reported to the court. The Master further reported that the inventions covered by the patents in question were of great utility and that the field covered by the patents held by each company was so close to the field covered by patents held by other companies that there was a sufficient likelihood of wasteful litigation to justify pooling.

When the Master's Report came before the Court for disposition, United States v. Standard Oil Co., et al. (1929) 33 F. (2d) 617, two of the questions presented by the Government's Exceptions were: "(2) May petitioner in this suit question the validity or the scope of the patents which it issued? (3) If the preceding questions be answered in the affirmative, are the patents valid?" The Court's opinion on these points was as follows, pp. 623-4:

"Respecting queries 2 and 3, little need be said in view of our ultimate conclusion as to the validity of the patents. This Court is divided respecting the right of the Government to attack the validity of the patents in these proceedings. We are satisfied, however, that we may inquire into the prior art to ascertain the scope of the claims of the various patents involved . . .

"Without discussing each patent at length and in detail, we will content ourselves with a statement of our conclusion. For the purposes of this suit we are not willing to disturb the Master's finding that the patents are valid."

The holding of the District Court was for the plaintiff that the defendants' system of licensing agreements did constitute an unreasonable restraint of trade. The defendants appealed to the Supreme Court, where the case was reversed, United States v. Standard Oil Co., et al. (1931) 283 U.S.

163, the present question being disposed of as follows, p. 181:

"Inasmuch as the Government did not appeal from 1164 these findings, we need not consider any of the issues concerning the validity or scope of the cracking patents, and we accept the finding that they were acquired in good faith. Neither the findings nor the evidence on this issue supply any ground for invalidating the contracts."

The foregoing cases, though not controlling, certainly afford a measure of support to the Government in this case. In addition, there have been a number of recent dicta in Supreme Court opinions which indicate rather clearly the present attitude of the Court on the question. These, too, are not conclusive, but that are, it is submitted, entitled to great weigh.

For example, in Ethyl Gasoline Corp. v. United States (1940) 309 U.S. 436, an antitrust proceeding in which the defendants were found to have extended their patent monopoly illegally in violation of the Sherman Act, Mr. Justice

Stone said, p. 456:

"In considering that question we assume the validity of the patents, which is not questioned here." (Emphasis sup-

plied.)

Again in *United States* v. *Masonite Corp.* (1942) 316 U.S. 265, which involved a conspiracy in restraint of trade in the marketing of patented hardboard, Mr. Justice Douglas said, p. 276:

"We assume arguendo that the patents in ques-

1165 tion, owned by Masonite, are valid."

It is a fair inference from the language used in these two opinions, as of the language of Mr. Justice Brandeis in the Standard Oil Co. case, discussed supra, that had the question of validity been raised, the Supreme Court would have considered evidence relating thereto. Certainly had Mr. Justice Stone been persuaded to the defendants' contention here, he would have said: "which may not be questioned here", instead of, "which is not questioned here".

A still more positive expression of the Supreme Court's attitude appears in the recent case of United States v. Univis Lens Co., Inc. et al. (1942) 316 U.S. 241. In holding that the defendants had violated the Sherman Act by using their limited patent monopolies to control general trade in lenses, the Chief Justice said, p. 248:

"The Government has not put in issue the validity of the lens patents, but argues that their scope does not extend

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beyond the structure of the lens blanks and consequently affords no basis for the Corporation's restrictions on the sale of the finished lenses which the wholesalers and finishing retailers fashion from blanks purchased from the Lens Company. . . .

"The record gives no account of the prior art and does not provide us with other material to which, if available, resort might appropriately be had in determining the nature

of an alleged invention and the validity and scope of .

1166 the patent claims founded upon it." (Emphasis sup-

plied.)

This statement by the Supreme Court is too recent and too pointed to leave much room for argument. In effect the court says that it is appropriate in an antitrust proceeding brought by the Government to show that the defendants' combination is illegal because based on invalid patents. When read with the Court's still more recent declaration in the Sola Electric Co. case, discussed supra, that even in a private litigation local rules of estoppel must yield "to the public policy of the Act which in the public interest precludes the enforcement of such unlawful agreements," it is submitted, there can be no question left. When the Government acts in its capacity as sovereign, it too is not to be thwarted by "local rules of estoppel". United States v. American Bell Telephone Co. (1897) 167 U. S. 224, 264-5. And see, United States v. Socony-Vacuum Oil Co. (1940) 310 U. S. 150, 225-8.

# Point II

The present proceeding is not a collateral attack to set aside or to nullify the defendants' patents, but is a direct attack upon the defendants' price-fixing activities, in which the fact of the invalidity of the defendants' patents may be shown.

The argument here is an elaboration of the first point of distinction, noted above, which differentiates this 1167 case from the Telephone Company cases. There the action was brought by the Attorney General out of a clear sky, so to speak, to cancel or set aside the patents in suit. Here the action is to enforce the Sherman Act, and the fact of patent invalidity is to be shown only incidentally. The present action is not one brought to cancel the defendants' patents.

The prayer of the present complaint, as amended on October 30, 1942, asks the Court as one item of relief to enjoin the defendants (a) from bringing any action for infringement of their patents, or (b) from collecting royal-

ties, "until it is made to appear to the Court that all improper practices have been abandoned and the consequences of all misuses of patents have been dissipated." This is a far different thing than to ask that the defendants' patents be cancelled. It is based on the simple proposition that if the defendants have used their patents illegally to restrain trade, as alleged, they are not entitled to relief in equity. As the matter was put by Chief Justice Stone in Morton Salt Co. v. Suppiger Co. (1942) 314 U. S. 488 at 491:

"But a patent affords no immunity for a monopoly not within the grant, . . . and the use of it to suppress competition in the sale of an unpatented article may deprive the patentee of the aid of a court of equity to restrain an

alleged infringement by one who is a competitor."

The defendants, in their Statement of Points and 1168 Authorities, base their argument on the broad proposition that the only possible way of putting the validity of a patent in issue as respects "novelty, utility, and form" is as provided by statute. Presumably the provisions of statute they have in mind are R. S. Sec. 4920, specifying how an alleged infringer must plead certain defenses and, R. S. Sec. 4918, setting up the procedure whereby an interference suit may be brought. Aside from these two means of raising the question of validity, it is their contention that the "determination" of the Patent Office is "final and conclusive."

Needless to say the authorities cited by the defendants do not support their argument. The first, United States v. American Bell Telephone Co. (1897) 167 U. S. 224, has already been considered; it held simply that, apart from statute, the United States may cancel or set aside a patent for fraud, a matter not now in issue here. It recognized, moreover, that, apart from statute, the United States might set aside one of its patents whenever "necessary in order to enable it to discharge its obligations to the public." Thus, so far from being authority for the limitation suggested by the defendant, the Telephone Company case is authority.

for the exact opposite.

Only two other patent cases are cited by the defendants under Point I. The first, Butterworth v. Hoe (1884) 112°U. S. 50, decided merely that the Sccretary of the Interior had no authority to review the determinations of the Patent Office, a matter about which there

should be no controversy here. The second, Wayne Mfg. Co. v. Coffield Motor Washer Co. (C.C.A. 8th, 1915) 227 Fed. 987, was an infringement suit based on a reissued patent: The principal question sought to be raised by the defendant was as to the sufficiency of the oath. On this point the court said, p. 991: "This patent recites that the required oath was taken, and this, in the absence of fraud, is conclu-

sive, in a suit against an infringer."

These are obviously very slender authorities upon which to argue that the United States may not in an antitrust case show that the defendants' patents are invalid. The opinion in the Wayne case is based in part on some very broad language by Mr. Justice Miller in Mahn v. Harwood (1884) 112 U. S. 354 to the effect that a patent "cannot be impeached collaterally." No mention is made that Mr. Justice Miller dissented in Mahn v. Harwood.

The majority opinion in Mahn v. Harwood, supra, stated, contrary to the defendants' contention, that "the statutory defenses are not the only defenses which can be made against a patent." The court then proceeded to hold, on the facts before it, that the plaintiff's reissue patent was

void. It is now well established in infringement suits that patents may be declared invalid not only

where it is apparent on the face of the patent that the Patent Office has erred, but where in the court's view the claims do not describe an invention, and this regardless of the fact that such defenses are not mentioned in R. S. Sec. 4920. Slawson v. Grand Street R.R. Co. (1882) 107 U. S. 649; Oswald v. Bloomfield (7th Circ. 1940) 113 F. (2d) 377.

It is also well settled that the "determinations" of the Patent Office are not "final and conclusive" on the question whether the patent describes the alleged invention in properly clear and concise terms. General Electric Co. v. Wabash Appliance Corp. (1938) 304 U. S. 364. Such matters are always open to question in infringement cases, notwithstanding they are not mentioned in R. S. Sec. 4920. These cases and those mentioned in the last paragraph are all authority for the proposition, to be discussed in greater detail in Point. III, that the determinations of the Patent Office are not "final and conclusive", except possibly as they concern the regularity of matters of procedure before the Patent Office.

The relevance of these infringement cases here is that they afford illustration of the point that a distinction is to be drawn between an action to cancel a patent and one where the fact of invalidity is shown incidentally. No one

may sue to cancel a patent, as for example upon a 1171 showing of fraud except the Government. Mowry v. Whitney (1871) 14 Wall. 434. But the fact of invalidity may be freely shown by the alleged infringer and,

it is submitted, by any party, including the Government, when validity becomes a material issue, as in the present

One of the leading cases illustrating this point is Pratt v. Paris Gas Light & Coke Co. (1897) 168 U.S. 255. That was a suit on a contract, brought in a state court, to recover the cost of a gas works erected by the plaintiff in accordance with a certain patent. At the trial the defendant was permitted to show that the plaintiff's patent was an infringement of a prior patent and void. The Federal question presented, on the appeal to the Supreme Court, was whether the state court might properly hear evidence on the point of patent invalidity. In sustaining the lower court, Mr. Justice Brown said, pp. 258-9:

"Had the action been in the Circuit Court of the United

"Had the action been in the Circuit Court of the United States defendant would obviously have had the right to show that the plaintiffs' patents were void; and an infringement upon prior patents as an excuse for rescinding the con-

tract . .

"The state court had jurisdiction both of the parties and the subject-matter as set forth in the declaration, and it could not be ousted of such jurisdiction by the fact that, incidentally to one of these defenses, the defendant claimed

the invalidity of a certain patent. . . . There is a clear distinction between a case and a question aris-

ing under the patent laws. The former arises when the plaintiff in his opening pleading—be it bill, complaint or declaration—sets up a right under the patent laws as ground for a recovery. Of such the state courts have no jurisdiction. The latter may appear in the plea or answer or in the testimony. The determination of such questions

is not beyond the competency of the state tribunal."

Further illustration is afforded by the case of Becher v. Contoure Laboratories, Inc., et al. (1929) 279 U.S. 388, 391-2. There an action was brought in a state court to have Becher declared trustee ex maleficio of a patent upon the ground that not Becher but the plaintiff was the true inventor. This action was then brought in the District Court by Becher to enjoin the state action for the reason that to permit the fact to be shown that Becher was not the first inventor would be to sanction a collateral attack which would show the patent to be invalid. This argument was effectively answered by Mr. Justice Holmes in these words at p. 391:

"That decrees validating or invalidating patents belong to the courts of the United States does not give sacrosanctity to facts that may be conclusive upon the question in issue. A fact is not prevented from being proved in any case in which it is material, by the suggestion that if it is

true an important patent is void—and, although there is language here and there that seems to

suggest it, we can see no ground for giving less effect to proof of such a fact than to any other. A party may go into a suit estopped as to a vital fact by covenant. We see no sufficient reason for denying that he may be equally

estopped by a judgment."

These cases would seem to establish the point that a party may show the fact of patent invalidity, in any case where that fact would be material to the litigation. Certainly the right to do so is not limited to those cases only where it is conferred by statute, as the defendants contend. While these cases arose between private individuals, there is no substantial reason why they should not apply equally where the Government is a party. It is true the Government may not intervene to cancel an invalid patent, merely to aid one individual at the expense of another; the defect there is lack of power; but, where the action is properly brought, any seeming impropriety in showing the true facts, where they are material, must yield in the broad interest of the public welfare.

One of the cases to illustrate this point most clearly is United States v. Bradford, 148 Fed. 413 (1905), (aff'd. C.C.A. 5th, 152 Fed. 616; cert. den. 206 U.S. 563). There an indictment was returned charging that the defendants had conspired to defraud the United States by obtaining the

issuance of land-scrip in satisfaction of a confirmed private land claim, which scrip, when issued, could

be located on public lands of the United States. The indictment further charged that the conspiracy was carried out by fraudulently procuring the appointment of an administrator of the succession of the true claimant on whose application the scrip was issued. The defendants objected that the case involved a collateral attack on the appointment of the administrator, which attack the Government must be debarred from making. In denying this contention the court said (p. 426):

"If, in a civil suit, the party seeks to attack collaterally the appointment of an administrator, he is told that his remedy is a direct attack in the court which made the appointment. But in this cause no remedy has been or could be suggested to the Government. It has not been even pretended that the Government would have had a standing in

a civil suit in the court of Washington parish to ask the annulment of the appointment. The proposition means therefore that whenever a criminal fraud is committed on the United States, they are absolutely powerless to prosecute the offenders, if the fraud has been committed by means of a state court judgment. Such a proposition is self-refuting.

"But I repeat that there is no collateral attack on the appointment of the administrator involved in this cause. A collateral attack on the appointment of an administrator

in a civil suit has invariably for its object his removal, or the denial or disregard of his authority,

or the recovery of some property or property right. The appointment of the administrator McCants—such as it is—has in no manner whatever been disturbed by this prose-

cution or its result."

Finally, the Court's attention is again called to Sola Electric Co. v. Jefferson Electric Co. (1942) 317 U.S. 173, discussed supra, which, it must be stressed, was not an infringement proceeding, but a counterclaim raising some of the same questions of Sherman Act violation as are here presented. In refusing to allow the defendant to show that plaintiff's patent was invalid (and hence that plaintiff's activities were in violation of the Sherman Act), Judge Sparks for the lower court made this statement: "Generally speaking, appellant as licensee is estopped to deny the validity of the patent under which he is licensed. This is elemental, and the citation of authorities in its support is unnecessary. This counterclaim is really an effort to override that principle, and it is sufficient for us to say that we cannot approve the effort." Jefferson Electric Co. v. Sola Electric Co. (C.C.A. 7th, 1942) 125 F. (2d) 322 at 324.

Justice said: "Local rules of estoppal which would fasten upon the public as well as the petitioner the burden of an agreement in violation of the Sherman Act must yield to the Act's declaration that such agreements are unlawful.

mount importance to the Court was that the public policy declared by the antitrust laws should not be defeated. It is very unlikely that the Supreme Court would now hold that, in a direct proceeding properly brought to enforce the Sherman Act, the Government may not show the same type of facts concerning patent invalidity as were allowed in the Sola case. To do so would "fasten upon the public" in this

case until 1954 the burden of an alleged illegal agreement in restraint of trade.

#### Point III

Patents for inventions are merely prima facie valid, and the courts have always permitted a party in a proper case to show their actual invalidity in the respects mentioned in paragraph 46a of the complaint.

The defendants' effort to show that the "determinations" of the Patent Office are "final and conclusive" must prove futile; all of the authorities are the other way, certainly

as respects the matters raised by paragraph 46a of the complaint. It may be true that "determina-

tions" concerning the regularity of patent office procedure; i. e. whether a proper inventor's oath was duly filed, the requisite fee paid, and so on, may not be inquired into collaterally, Wayne Mfg. Co. v. Coffield Motor Washer Co. (1915) 227 Fed. 987, discussed supra. But matters of that sort are not in issue here; the charges made in paragraph 46a deal with invalidity because of lack of invention, anticipation by prior use, publication or invention, lack of utility, failure to state claims with proper clearness and conciseness, and, on such matters, the patents are at most only prima facie valid.

Consultation of the Congressional debates fails to disclose any intention to make patents "final and conclusive" when issued by the Patent Office. It does appear from Senator Ruggles' select committee report to the 24th Congress on April 28, 1836 (12 Cong. Debates, pt. 4, app. p. 101), that an effort was made to give them greater certainty. Therefore, patents had been issued somewhat casually as a mere ministerial act by the Secretary of State, or some other cabinet officer, with the result that a considerable number of the patents so issued were worthless and void, giving rise to a great number of patent suits. As said by Senator Ruggles: "The country becomes flooded

with patent monopolies, embarrassing to bona fide patentees, whose right are thus invaded on all sides, and not less embarrassing to the community gen-

It is fair to say that the Act of 1836, therefore, was designed to meet this evil, primarily by setting up a patent office capable of stopping much of it at the sources. At the same time the bona fide patent holders' position was strengthened by requiring that the infringer plead specially all matters of anticipation, as is still provided by R. S. Sec. 4920, at least 30 days before trial. As said by the

Committee, p. 103: "The present law waits till infringements and frauds are consummated—nay, it even aids them; and then it offers an inadequate remedy for the injury, by giving an action for damages. It ought, rather, by refusing to grant interfering patents, to render prosecution unnecessary."

The court, in Reckendorfer v. Faber (1875) 92 U. S. 347, made it very clear, however, that the acts of the Commissioner of Patents were not to be final and conclusive. The patent before the court, one having to do with a combination drawing pencil and eraser, was held void for lack of invention. Mr. Justice Hunt stated the matter as follows.

p. 351:

"Before the commissioner is authorized to issue a patent, it must appear to him that the claimant is justly entitled to a patent; i. e., that his art, machine, or manufacture, possesses all the qualities before mentioned. The commis-

sioner must also be satisfied, that, if it possesses these qualities, it is sufficiently useful and sufficiently important to justify him in investing it with

the prima facie respect arising from the governmental approval. . . . It is nowhere declared in the statute that the decision of the commissioner, as to the extent of the utility or importance of the improvement, shall be conclusive upon that point; . . ."

The case of *Dunbar* v. *Myers* (1876) 94 U. S. 187 affords further illlustration. The question there was whether the addition of a second deflecting plate on a circular saw constituted invention. Testimony of various witnesses was introduced to show that the device was old and that the addition of an extra deflecting plate did not involve inven-

tion. In dismissing the case, the court said, p. 196:

"Persons seeking redress for the unlawful use of letterspatent must allege and prove that they, or those under
whom they claim, are the original and first inventors of
the alleged improvement, and that the letters-patent have
been infringed by the party against whom the suit is
brought. Prima facie support to the first requirement is
derived from the patent, if it is introduced in evidence and
is in due form, provided the alleged improvement is one
which in its nature is patentable. Evidence to overcome that
presumption, however, is always admissible, if due notice
is given by the opposite party, as required by law; and the
question is now well settled, that the question

whether the alleged improvement is or is not patentable, is in an equity suit, a question for the court." In the often cited case of Slawson v. Grand Street R. R. Co. (1882) 107 U. S. 649, the question was whether it constituted invention to put a second glass in a fare box, so that the passenger, as well as the operator, could see what fare was paid. The lower court discissed the case on the ground that the patent did not disclose invention and was void, although the defendant had not pleaded the particular point. The Supreme Court in affirming this holding made the following comment, p. 652:

"We think the practice thus sanctioned is not unfair or unjust to the complainant in a suit brought on letterspatent. If they are void because the device or contrivance described therein is not patentable, it is the duty of the court to dismiss the case on that ground, whether the defence be made or not. It would ill become a court of equity to render a money decree in his favor for the infringement of letters-patent which are void on their face for want of

invention." (Emphasis supplied.)

It is not necessary to cite further cases; they are collected in 48 Corpus Juris, (1929) Sec. 258, where it is said: "The decision of the patent office is not conclusive upon question of patentability, such as novelty, utility, invention,

prior use or sale, and abandonment." To this list may be added the equally well settled point that the "determinations" of the Patent Office are not "final and conclusive" on the question whether the claims describe the alleged invention in properly clear and concise terms. General Electric Co. v. Wabash Appliance Corp. (1938)

304 U.S. 364.

Further evidence of the prima facie character of a patent is shown by a consideration of the purpose and effect of the Act of June 25, 1910 (35 U. S. C. A., Sec. 68), by which jurisdiction was conferred upon the Court of Claims to hear cases when the United States is itself an alleged infringer. Prior to this statute recovery could not be had against the United States, except as it was possible to prove an implied contract. United States v. Burns (1870) 12 Wall. 246. As a consequence a great many special bills were being presented to Congress for relief. It was to put such matters on an orderly basis that the statute was passed.

This statute provides that: "In any such suit the United States may avail itself of any and all defenses, general or special, that might be pleaded by a defendant in an action for infringement, as set forth in this chapter, or otherwise." This is a very broad provision; it neither recognizes that

patents are "final and conclusive" nor suggests that there is any impropriety in giving the Government full right to

question validity in a proper case.

passed had chiefly to do with whether Congress or the Court of Claims was the better tribunal to dispose of such cases. The provision just quoted was inserted more or less as a matter of course, not as one conferring special rights, but to make sure that the Government would not be denied all usual defences in a matter concerning its "proprietary" interests. That Congress considered all patents to be merely prima facie in character is apparent from the comments of Mr. Lenroot in the course of the debate where he said:

"Mr. Lenroot. Mr. Chairman, it is not, as I have said two or three times on the floor during this debate—it is not competent, in my opinion, for Congress to settle these questions of compensation for torts to patentees. In the first place, the first question in nine cases out of ten of this character is, Has the inventor a valid patent? The patent granted in the first instance gives the inventor only a prima facie right. Anyone can go into court and test the validity of a patent because of a prior patent covering the same subject, or for many other reasons. That is the first question and a most serious question. Then, if that be decided in favor of the inventor, comes the question of damages, and in every case the damages are unliquidated. These are not easy of ascertainment. I submit that the Committee on Claims is not competent, with the limited time at its disposal, to dispose of and decide these questions.

at its disposal, to dispose of and decide these ques-1183 tiens, the validity of the patents and the amount of damages which should be awarded. 45 Cong. Rec.

Pt. 8, p. 8771, (June 12, 1910)."

The defendants have relied upon a number of land cases in their statement of Points and Authorities. For example, in *United States v. Coronado Beach Co.* (1920) 255 U.S. 472, a condemnation case, the Government sought to question and limit the extent of the original grant. In refusing to give weight to such a contention the court, by Mr. Justice Holmes, said, p. 488:

"It is said that field notes, not put in evidence at the trial, show that the deep water line was not surveyed, but was taken from the Coast Survey maps. But however arrived at it was adopted by the United States for its grant

and it cannot now be collaterally impeached."

It is submitted that holdings of this sort have little relevance to the present discussion. The function of the Govern-

ment in issuing deeds for land is very different from that involved in passing upon applications for patents for inventions. The facts necessary to a determination in the land cases can be ascertained in advance and the grant should be final, just as are the determinations of the Patent Office in passing upon the procedural aspects involved in issuing a patent for an invention. But the matters in issue here: i.e., as to whether the purported invention involves that "flash of genius" which entitles it to recognition. whether some one else in this country may have first con-

ceived the idea and put it in practice, whether some publication, somewhere, may have disclosed the idea. 1184 whether the invention actually possesses utility, whether the patent as claimed by the inventor properly describes his invention, are all matters on which in varying degrees the Patent Office is neither equipped nor expected.

to make a final determination.

The upshot of the matter is that so far from being "final and conclusive" letters-patent are merely prima facie valid. Being entitled to nothing more than a presumption of fact, the actual validity of the patent is always subject to examination before the courts. As the Supreme Court said in Palmer v. Corning (1895) 156 U.S. 342:

"There is no doubt that in this, as in all similar cases, the letters patent are prima facie evidence that the device was patentable. Still, we are always required, with this presumption in mind, to examine the question of invention

vel non upon its merits in each particular case."

It is well established, moreover, that the presumption of validity can on occasion be rather easily dispelled. Of course, where a showing is made that the prior art was carefully and fully reviewed by the Patent Office before the patent was issued, the presumption of validity is given added weight. In Smokador Mfg. Co. v. Tubular Products Co. (C.C.A. 2, 1929) 31 F. (2d) 255, where that was the situation, Judge Hand said, p. 257:

"All the patents of the prior art which we have discussed were cited against the patent in suit during its progress through the Patent Office, and it was

granted over these references. The regular presumption of validity accompanying a patent thus gains added weight."

But the converse is equally true, namely, that the presumption of validity is greatly weakened or disappears altogether where it appears that the facts relied upon in the infringement suit to show anticipation of the patent sued upon were not before the Patent Office at the time of granting the patent. One of the leading cases on this point is American Soda Fountain Co. v. Sample (C.C.A. 3, 1904)

130 Fed. 145, where the court said, pp. 149-150:

"We do not agree with the contention that the fact that the file wrapper discloses the patent to have been granted as first applied for, without any references, adds any force to the presumption of novelty arising from the grant. On the contrary, we think the force of that presumption is much diminished, if not destroyed by the lack of any reference by the Examiner to, or consideration of, the 'Clark' patents. It does not seem likely that an expert examiner would pass them by, without notice or consideration, if they had been called to his attention. We feel compelled, therefore, to the conclusion, that the first and fifth claims of the invention are invalid for want of patentable novelty." [Italics supplied.]

In International Flatstub Check Book Co. v. Young & Selden Co. (C.C.A. 4, 1922) 284 Fed. 831, the court 1186 described the effect of the failure of the Patent Office

to cite another patent, as follows, p. 832:

"The presumption of validity from the issuance of the patent ought generally to have great weight, but in this case it is greatly weakened by the fact that the file wrapper does not contain any reference to the Loewenbach patent. This fact indicates that the Loewenbach patent was overlooked by the Patent Office." [Italics supplied.]

See also Maibohm v. RCA Victor Co., 89 F. (2d) 317,

320 (C.C.A. 4, 1937).

In Westinghouse Electric & Mfg. Co. v. Toledo, P. C. & L. Ry. Co. (C.C.A. 6, 1909) 172 Fed. 371, the court stated,

p. 392:

"It should be noted that it appears from the record that neither Wightman nor the Potter patent was cited to the examiner in the Patent Office and were overlooked by him. This circumstance affects the presumption in favor of the validity of the patent from its issuance."

See also McClintock v. Gleason, 94 F. (2d) 115 (C.C.A.

9, 1938.)

In Mettler v. Peabody Engineering Corp. (C.C.A. 9, 1935) 77 Fed. 56, the court described the effect of a showing of anticipation not considered by the Patent Office as follows, p. 58:

"The presumption of validity which attends the issuance of letters patent by the patent office is overcome in this case

by the clear evidence of anticipation in the prior art 1187 which was not cited or considered by the latent Office when the application for appellant's patent was passed on." See also Alexander Anderson, Inc. v. Eastman, 16 F.

Supp. 513, 515 (D.C. S.D. Calif., 1936).

Where the evidence shows that the matter covered by the patent in the infringement suit has been in public use for some time prior to the date of application, the presumption that the patentee was the prior inventor no longer exists, and the burden is on him to show that he is the original inventor. This principle is expressed in Graham Paper Co. v. International Paper Co. (C.C.A. 8, 1931) 46

F. (2d) 881 as follows, p. 885:

"That there is a presumption of validity, utility, and invention from the fact that a patent has been issued by the Patent Office is well settled. Tropic-Aire, Inc. v. Sears, Roebuck & Co. (C.C.A.) 44 F. (2d) 580. How strong this presumption of validity may be is debatable, in view of the multiplicity of patents being issued. It is referred to by the trial court in its opinion as follows: The case is made troublesome because of the many patents in evidence, which together constitute a glaring example of issuing patents for the merest shade or shadow of inventive advancement. The situation casts doubt upon the wisdom and logical truth of ascribing presumptive validity in even a close case, from the fact of the grant. This statement does not refer to Patent No. 1,377,566, so particularly, because I am constrained to the view, if I follow the evidence offered.

as I must, that the above patent is valid.' We have considerable sympathy with the trial court's expression on this subject. If patents are to be issued for every trifling device, the presumption of validity will be greatly weakened. The Supreme Court has referred to this in Atlantic Works v. Brady, 107 U.S. 192, 2 S. Ct. 225, 27 L. Ed. 438; also in Dunbar v. Meyers, 94 U.S. 187, 24 L. Ed. 34. The Supreme Court in Eibel Co. y. Paper Co., 261 U.S. 45, 63, 43 S. Ct. 322, 328, 67 L. Ed. 523, said: 'In administering the patent law, the court first looks into the art, to find what the real merit of the alleged discovery or invention is, and whether it has advanced the art substantially. If it has done so, then the court is liberal in its construction of the patent, to secure to the inventor the reward he deserves."

In Carson Inv. Co. v. Anaconda Copper Mining Co. (D.C. Mont. 1927), 17 F. (2d) 815, rev. other grounds 26 F. (2d) 651 (C.C.A. 9, 1928), (holding on reversal that fraud could not be set up as a defense in an infringement suit) there was an element of fraud in the case in addition to the fact that the prior art had not been considered in

the Patent Office and the court made the following statement as to the effect of these circumstances on the monopoly, pp. 826-27:

"A principle not urged, and yet which might have been of weight, is that patents which issue without due considera-

tion of the prior art are entitled to little, if any, presumption of validity. See American, etc., Co. v.

Sample (C.C.A.) 130 F. 149. To which, is ventured, might be added those patents issued because of misrepresentation, fraud, or mistake. As in frauds generally, proof of it ought to shift the burden of evidence. Although none but government can maintain suit to cancel the patent, any of the public from whose domain the intangible right in common possession is sought to be monopolized should be free to expose the fraud to that end."

#### Point IV

Assuming that in an ordinary antitrust proceeding the Government would be estopped to question the validity of the defendants' patents, nevertheless, on the facts of this case, the defendants are themselves estopped to insist

upon the point.

In the foregoing discussion it has been pointed out, first, that the United States did not bring this action as a mere volunteer, but in its sovereign capacity to enforce the antitrust laws. Second, in such a proceeding, where the purpose is not to have the defendants' patents declared invalid, the fact of their invalidity may be shown incidentally to disprove the defendants' plea that they are privileged to fix prices under "valid patent monopolies." Thirdly, the established cases have been discussed showing that the determinations of the Patent Office upon matters of patent-

ability are never "final and conclusive"; the issuance of a patent gives rise merely to a prima facie pre-

sumption of fact.

It is submitted that the right of the plaintiff in an antitrust case to introduce evidence of patent invalidity is clearly established. Assuming, however, for purposes of argument, that a contrary view were to be taken, it is submitted that upon the admitted facts of this case the defendants are in no position to insist upon the point. This is an action in equity and, as shown above, the defendants' argument that the Government may not dispute patent validity rests, at best, on certain notions of propriety; as a matter of substantive law there can be no question that the defendants may not assert a monopoly based on invalid paper patents. It is contended here that before considerations of supposed propriety will be allowed to defeat substantial public rights, it must most certainly appear that the defend-

ants have themselves observed the proprieties.

Attention is first invited to the nature of a prosecution for a patent before the Patent Office. It is an ex parte proceeding. Moreover, the sporting theory of justice prevails; the applicant makes a showing at arms length that the requirements of R. S. 4886 have been met. It is then for the patent examiner, upon such study as he can make of the application and of the prior art, to determine whether a patent should issue. The proprieties do not require that any references to the prior art known to the applicant be

submitted to the examiner.

well be "final and conclusive" upon matters of patentability. The patent examiner is neither equipped to make the searching examination which would be necessary, nor could business be done if he took the time that a full examination of prior art, utility, and so on would require. The Commissioner issues a patent which is prima facie valid. Reckendorfer v. Faber (1875) 92 U.S. 347. And, in doing so, he relies heavily upon the oath and the affidavits submitted by the applicant himself. Without the inventor's oath the patent is void. Kennedy v. Hazelton (1888) 128 U.S. 667.

By his oath, the inventor assures the Patent Office that he does verily believe that he is the original and first inventor of the article for which he solicits a patent, and that he does not know and does not believe that the same was ever before known or used. In addition, to satisfy the statutory requirement that the article is both new and useful, 35 U.S.C.A. Sec. 31, it is usual to show by affidavit the commercial success of the product. In the case of the Roos "foam" patent, No. 2,017,022, patent counsel submitted an affidavit stating that more than 3,000,000,000 square feet of wallboard embodying the Roos invention had been manufactured and sold during the preceding tenyear period. It was further pointed out that seven manufacturers, that is, the present defendant or their predecessors, had taken licenses, and were producing the

1192 board in large quantities.

This was an impressive showing and no doubt influenced the Patent Office. It is well established that evidence of commercial success may properly be considered in such case. The following excerpt from Paramount Publix

Corporation v. American Tri-Ergon Corp. (1935) 294 U.S. 464, Mr. Justice Stone writing for the court, states the accepted reasoning upon which the rule is based, p. 474:

"Evidence of great utility of a method or device, it is true, may in some circumstances be accepted as evidence of invention. Where the method or device satisfied an old and recognized want, invention is to be inferred, rather than the exercise of mechanical skill. For mere skill of the art would normally have been called into action by the generally

known want."

The point to be noted here is that the Patent Office had no practical means of checking the Roos figures or the Roos affidavits; it evidently assumed them to be true. Moreover, no mention was made to the Patent Office that U.S.G. and its above mentioned licensees comprised all of the manufacturers east of the Rocky Mountains and that the license agreements under which they operated provided for price fixing and had the effect, here alleged, of driving unpatented board from the market.

Such matters, if known to the Patent Office, might obviously have had a bearing upon its determinations. McClain v. Ortmayer (1891) 141 U.S. 419; Thropp's Sons Co. v. Seiberling (1924) 264 U.S. 320. In other words the primary purpose of the industry in adopting the Roos patents may not have been so much because of their novelty or utility as because they afforded a ready means of bringing erstwhile competitors together in a combination in restraint of trade. Such was the situation before the court in American Equipment Co. v. Tuthill (C.C.A. 7th, 1934) 69 F. (2d) 406, at p. 409, where Judge Evans said:

"The oral testimony of different witnesses, who spoke for different licensees, leaves no doubt as to the intent of the contracting parties. They entered into the agreement to control prices and regulate the number of brick each should manufacture, not to secure the advantages which flowed from the use of the patented machine or article. It is possible that both results were desired, but the dominant thought, purpose, and plan were to control brick production and brick prices in the Chicago area."

In other words the point can be made in this case that some of the data furnished the Patent Office as a basis for issuing Roos patent, No. 2,617,022, may have been the result of the present combination. It would be a strange perversion of law if the defendants could combine to provide the evidence of novelty and utility upon which a patent is

issued, and then be allowed to estop the Government from showing the true facts in an antitrust proceeding, since it had issued the patents in reliance on that evidence.

There is an ancient principle of law that: "An estoppel against an estoppel, as Lord Coke says, setteth the matter at large." 11 Am. and Eng. Ency. of Law (2d ed.) 392. In the light of this principle, it would seem that whenever the Patent Office has issued a patent in reliance upon the oath and affidavits of the applicant, he and his assigns should be estopped to insist as against the Government that his patent is "final and conclusive" upon the matters as represented to be true. That, in fact, is the very purpose and significance of the inventor's oath; the defendants' contention, that the oath loses its significance the moment the patent issues, has no support in either reason or authority.

The case of Commonwealth v. Brierly (1908) 37 Pa. Superior Ct. 496, decided by a unanimous court, affords a good illustration. There a patent for land was issued by the commonwealth upon an application alleging that the land was vacant. Subsequently the commonwealth acquired the land for forestry purposes from a holder by a prior patent, also issued by the commonwealth. The action was for trespass to try the title, it being contended by the defendant that because his warrant and patent were issued to him by the commonwealth, for a valuable consideration, the latter was estopped from afterwards acquiring, by

purchase, the older title and setting it up to 1195 defeat its own later grant. To this the court said,

"Upon the filing of such an application, the land laws of the state neither required nor authorized an independent investigation by the land office to ascertain the truth of the basic fact asserted in it. The warrant issued, as of course, and the responsibility for the result that, if the land had been previously appropriated no title passed, was left and properly left to rest with the applicant who had voluntarily assumed it. Under such circumstances we cannot see how Strouse could have successfully invoked the aid of the doctrine of equitable estoppel to ward off the consequences that necessarily flowed from his own mistaken or false representation that the land applied for was vacant land. If he could not, the defendant, whose rights in this respect rise no higher than his, cannot." [Italics supplied.]

It is true that in a patent case the Patent Office does make an investigation. But it is even more true that, with the thousands of applications and the increasing intricacy of al'eged inventions, it becomes less and less possible to make a "conclusive" investigation of utility or patentability before a patent is issued. Moreover, it is literally impossible to check up on matters of anticipation. The Patent Office cannot be expected to say finally that someone, somewhere, may not have first conceived the idea in question and re-

duced it to practice. Obviously the examiner must feely on the applicant's oath and representations in

issuing a patent. Under such circumstances, it is submitted, the inventor may not invoke the doctrine of equitable estoppel against the Government, as said in the Brierly case, supra, "to ward off the consequences that necessarily flowed from his own mistaken or false repre-

sentations."

But the argument does not end there. The usual check upon the determinations of the Patent Office is the infringement suit. In ordinary course the invalid patent will either not be used at all by the inventor, or, if used, will be quickly challenged by others interested in the art. So obvious was this to the court in United States v. Bell Telephone Company (1897) 167 U.S. 224, 266, discussed supra, that it did not consider the point that the Government might properly bring an action to relieve "the public of the burden of a monopoly charged to have been wrongfully created" as sufficiently important to discuss. The matter would be disposed of in private litigation. Since R. S. Sec. 4920 fully recognized the rights of an alleged infringer, the court reasoned that there was no occasion for the Government "to maintain a suit in equity to cancel that against which the individual has a perfect legal defence available in any action brought by or against him."

In this case, however, the five named patents have never been litigated. In fact, it is provided in each of the

U.S.G. comprise all the manufacturers east of the Rocky Mountains, will not contest the validity of the U.S.G. patents. By the October, 1929, agreements, moverover, the licensees, in addition to acknowledging the validity of the patents already issued, purport to acknowledge the validity "of any letters patent which may be granted or issued for or upon said applications." (See, Complaint, p. 75.) It was stated by counsel for the defendants before the court at the argument on October 15, 1942, that no reason was apparent to him why the agreements went so far. (Transcript, October 15, 1942, p. 155)

Not only, therefore, has the defendant U.S.G. asked the Government to issue the patents in suit upon its representations of fact, but it has combined with the licensee defendants to stop any normal test of their validity. Of course it is true that anyone interested might if he saw fit infringe one or more of the patents in suit and so provoke a test. But the answer is first that as a matter of practical business sense no one is going to hazard the thousands of dollars necessary to make an effective challenge against a powerful combination carefully fenced in behind, not one, but many patents in the art.

The better answer is to point out that, even were a test by infringement suit a practicable possibility, still the defendants do not appear in a favorable light before an

equity court. Assuming that they have only partially 1198 closed the door to a fair test of the validity of their patents, by what standard of propriety do they now demand that the Government, in the enforcement of the Antitrust laws, should be wholly estopped to set up the true facts. It is submitted that the shoe is on the other foot, the defendants have estopped themselves to insist that the Government is estopped, and the matter is now at large.

The policy which should prevail in the situation under consideration would seem to be that which was expressed by the Supreme Court in *Pope Mfg. Co.* v. *Gormully* (1892) 144 U.S. 224, where it refused to enforce a contract whereby the defendant had agreed not to dispute numerous patents of a licensor after the license was terminated. There the

court said, p. 234:

"It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly; and it is a serious question whether public policy permits a man to barter away beforehand his right to defend unjust actions or classes of actions, though, in an individual case, he may doubtless assent that a judgment be rendered against him, even without notice." [Italics supplied.]

Defendants' agreements not to contest the validity of patents already issued may be valid when viewed singly and in the abstract. When taken together and con-

1199 sidered in the light of the allegations of the present complaint, it is submitted they are void as being against public policy. Their agreement not to contest the validity of patents if and when issued on pending applications, which in this case refers to the three Roos "feam"

patents, is plainly void. Agreements of that kind, designed to build a monopoly regardless of the true facts, estop the defendants from objecting to the introduction of evidence by the Government to show the actual truth of the matter.

#### CONCLUSION

For the reasons above stated, it is respectfully submitted, that the defendants' motion to strike paragraph 46 (a) of the complaint, or, in the alternative, for partial judgment upon the issue framed by that paragraph and paragraph 35 of the U.S.G. answer, should be denied.

ROSCOE T. STEFFEN,
EDWARD KNUFF,
Special Assistants to the Attorney General.

WENDELL BERGE,
Assistant Attorney General.
October 18, 1943.

1200 Justice STEPHENS. You may call the next witness.

Mr. Knuff. May it please the Court, before I call the next witness, Mr. Steffen has been ill ever since the Court has adjourned. He talked to my wife yesterday on the long distance telephone. His temperature has subsided somewhat, and he expects to be in Washington sometime today. However, I will proceed with the case.

Justice STEPHENS. You may do so, Mr. Knuff.

Mr. Knuff. May it please the Court further, in view of the fact that some of the Government's exhibits are on very thin paper and are liable to become torn or mutilated, we would like to have permission of the Court to substitute, in lieu of the original, a photostatic copy thereof. We have the originals in Court, we will show the originals to counsel for the defendants, but we would like to have a photostat substituted.

I assume that counsel for the defendants can have no

objection to that.

Mr. Johnston. If the Court please, in doing that I would suggest that we have them compared by the reporter, because I have withdrawn the exhibits and have had photostatic copies made of them as they were introduced, so I would be sure they were the same.

Mr. KNUFF. We will substitute, at the time of the offering of the exhibit, the photostat itself. In other

words, there will be no opportunity for any exhibit to be missing at all. We will substitute the photostat at the time we offer the exhibit.

Justice Stephens. What is the nature of these fragile

papers?

Mr. KNUFF. Onion skin paper, Your Honor. We don't think this case will ever have to be tried again, but if it does we would like to have the papers in as good condition

as we can possibly have.

Justice STEPHENS. It seems to the Court, Mr. Knuff, that no original exhibit, at least until after the case is finally disposed of, ought to be taken out of the possession of the Court. Of course, it ought not to be mutilated or thumbed over to the point where its original condition would be destroyed, but it seems to us that no original exhibit should be withdrawn from the custody of the Court until the case is finally disposed of. Of course, there are some occasions on which, after a case has been finally disposed of, exhibits which are necessary to the files of the parties are withdrawn and returned. But it would seem to us that the better practice would be for you to introduce your onion skin exhibit and file a photostat at the same time, with the understanding that both will remain in the record, but that the Judges and the Court Reporter and counsel will, so far as possible, use only the photostat, so as to preserve the originals.

1202 Mr. KNUFF. Offhand, I can't say that I object to that, but I will say to the Court that inadvertently I have violated that. I have taken the originals back to my office. It was a mistake of the head, however, and not

of the heart.

Justice STEPHENS. The Court doesn't mean to suggest that it doesn't trust the officers of the Court. It is customary for counsel in the case to withdraw from the possession of the Court Reporter, during the trial, an original exhibit. There is no question about that, Mr. Knuff, at all. But the point was that we thought your proposal was that the originals should be introduced and then permanently withdrawn so that they would not come again into the custody of the Court, and that, I think, ought not to be done, and my colleagues agree with that.

Mr. KNUFF. I didn't mean to so indicate. We will at any time allow any attorney for the defendants to ex-

amine the originals at any time at all.

Justice STEPHENS. We think the originals ought all to remain in the custody of an officer of the Court, but in

order that the originals may not be destroyed or impaired. a photostat should be filed also in respect of those originals that are in a fragile condition. And the Court Reporter, if necessary, may keep the originals in a separate folder or lile, and use the photostats for regular use.

You may proceed.

1203 Mr. KNUFF. In view of the fact that I am working somewhat under a handicap and haven't anybody to hand me any papers, and I have to do it all myself, possibly I had better use this lectern today.

Mr. A. S. Blagden!

Thereupon, Augustus S. Blagden, called as a witness for and on behalf of the United States, having been duly sworn, testified as follows:

# DIRECT EXAMINATION by Mr. KNUFF.

Q. Your name, sir, is Augustus S. Blagden?

Q. Would you spell your last name for the benefit of the Court Reporter?

A. B-l-a-g-d-e-n.

Q. Where do you live, Mr. Blagden?

A. Ambler, Pennsylvania.

Q. And with what compary are you now employed?

A. American Type Founder Company, Inc.

Q. American Type Founders, Inc.?

A. Yes.

Q. And where is that located?

A. Elizabeth, New Jersey.

Q. How long have you been so employed?

1204 A. It will be a year or a year and a half last

Q. In what capacity are you employed with the American Type Founders?

A. Assistant to the President.

Q. And what is the business of the American Type Founders?

A. Before the war, making type and printing presses; now, 95 per cent guns and gun parts.

Q. Your company is now engaged in war work? A. Yes, sir.

Q. What are your duties?
A. Assisting in the management.

Q. You were subpoenaed as a Government witness in this case, were you not?

A. Yes, sir.

Q. And you were likewise subpoenaed as a witness to appear before the additional Grand Jury in the District of Columbia, were you not?

A. Yes, sir. Q. Do you recall when that was?

A. About two years ago.

Q. Would you say it was in May, 1940?

A. Yes, sir, that is about right.

Q. Were you formerly connected, Mr. Blagden, with the gypsum industry?

1205 A. Yes, sir.

Q. When did you first enter the gypsum indus-

A. About 1923.

Q. And how long did you stay?

A. To 1928.

try?

Q. With what company or companies were you associated?

A. The Beaver Board Company was the holding company of the Beaver Products Corporation.

Q. The Beaver Products Company was the operating company?

A. Yes.

Q. And the Beaver Board Company was the holding company, is that correct?

A. That is right.

Q. And what was your position with that company?

A. President.

Q. And you were President of those two companies from 1923 until 1928?

A. Right.

Q. What were your duties as President?

A. The general management of the company.

Q. Did the Beaver Products Company manufacture gypsum products?

A. Yes, sir.

Q. What products did they manufacture?

1206A. Plaster and plaster wallboard.

Q. When did you start to manufacture plaster wallboard—and by "plaster wallboard", sir, I mean wall-board, plaster lath, and plasterboard?

That was being manufactured when I came in the

company.

Q. And it was manufactured all during the time you were with the company?

A. Yes, sir.

Justice STEPHENS. Which was the holding company? Mr. KNUFF. The Beaver Products Company, sir, as I understand it, is the operating company. The Beaver Board Company is the holding company. Mr. Blagden can correct me if I am wrong on that.

The WITNESS. That is right.

By Mr. KNUFF.

Q. Board was being made when you came with the company?

A. Yes, sir.

Q. What type edge did that board have, sir?

A. A folded edge. Q. A folded edge?

A. Yes, sir.

Q. And where did you sell your products, over what area, I mean?

A. East of the Rocky Mountains.

1207 Q. Up and down the Atlantic Seaboard? A. Yes, sir.

Q. And East of the Rocky Mountains?

A. Yes, sir.

Q. In all States? A. Pretty much.

Q. What was the leading company in the industry at that time, sir?

A. U. S. Gypsum.

Q. And what position did your company occupy in the industry?

A. I should think we were the second.

Q. And do you know what position any other companies occupied, if you know?

A. I don't remember.

Q. All right. Now Mr. Blagden, were you familiar with other executives connected with other gypsum companies?

A. I met them from time to time.

Q. Will you name some of the companies and some of the executives with whom you were familiar?

A: The Certain-teed Products Company, Ebsary, and I

don't remember any others.

Q. You have named Certain-teed and you have named Ebsary.

A. Yes, sir.

1208 Q. Was there a gypsum company known as the Atlantic Gypsum Company in business at that time?

A. The Atlantic were not making wallboard at that time.

Q. They were, however, in the gypsum business?

A. Yes, sir.
Q. Did you know a company by the name of American?

A. There was the American.

Q. Did you know of a company by the name of National?

A. Yes, they were just coming in.

Q. Did you know a company by the name of Niagara?

A. I don't remember that.

Q. You don't remember the name Niagara?

A. I am not sure.

Q. Is the name Reeb familiar to you?

A. Yes, sir; now I know, yes, sir. Q. Did you know a company known as the Texas Cement Plaster Company?

A. That is right, yes, sir.
Q. Did you know a company by the name of Universal?

A. Yes, sir. Q. And, of course, you knew of United States Gypsum Company?

A. I said so, yes, sir.

Q. So that American, Certain-teed, Ebsary, National, Niagara, Texas, Universal, and USG, are the companies that you knew were in business during the time that you were President of the Beaver Products

Company, is that correct?

A. Yes, sir.
Q. Do you know of any other companies in the United States that were located East of the Rocky Mountains, that sold gypsum board?

A. I don't remember of any.

Q. Are the companies that I have named all of the companies in the United States East of the Rocky Mountains?

A. Right.

Q. Did you know any of the officials of any of those companies?

A. I met their Presidents and Vice Presidents.

Q. Let's take Atlantic. Did you know anybody in Atlantic?

A. Fuller.

Q. Anybody else?

A. I don't remember anyone else, he is the man that I

Q. Mr. Fuller's name was Willard Fuller, is that 'correct?

A. I think so.

Justice GARRETT. Will you speak a little louder, Mr. Witness?

1210 The WITNESS. Yes, sir.

# By Mr. KNUFF.

Q. Did you know a gentleman by the name of Mr. Neale?

A. Yes, sir, I knew him.

Q. Did you know a gentleman by the name of Mr. Channing?

A. Yes, sir.

Q. With American, whom did you know?

A. You will have to mention the name first, and then maybe I can get it.,

Q. Did you know any person by the name of Griswold?

A. I have met him.

Q. Did you know Arthur Black?

A. I don't remember him.

Q. Did you know John Kling?

A. I remember the name.

Q. Did you ever meet the gentleman?

A. I don't know.

Q. Your best recollection, sir?

A. I may have.

Q. Now with Certain-teed, who did you know with that company?

A. Mr. Brown.

Q. There were two Browns with Certain-teed. A. Brown and his nephew, the sales manager.

Q. Who was the President of Certain-teed?

1211 A. George Brown.

Q. And his nephew's name was what?

A. C. O.

Q. Claude O. Brown?

A. Yes, sir.

Q. Did you know Mr. Whittemore?

A. Yes, sir.

Q. Did you know Mr. Warren Henley? A. Warren Henley was in our company. Q. He was with Certain-teed, wasn't he?

A. No, sir, Warren Henley was with the Beaver Board.

Q. He later was with Certain-teed, we will put it that way?

A. Yes, sir.

Q. At the time you were in the gypsum business, however, Mr. Henley was connected with the Beaver Products. Company, is that correct?

A. That is right.

Q. Did you know Mr. L. R. Walker?

A. Yes, sir.

Q. Did you know Mr. Elisha Walker?

A. Yes, sir.

Q. Were those two gentlemen connected with Certainteed?

A. Elisha Walker was not.

·Q. He wasn't on the Board of Certain-teed? 1212

A. He may have been, I don't know.

Q. Now with Ebsary, did you know Fred Ebsary?

A. Yes, sir.

Q. Did you know Mr. George Lenci?

A. I remember the name.

Q. Do you recall whether or not you knew him or just knew the name?

A. I can't remember him.

Q. You can't remember him?

A. No.

Q. You have, however, heard of the name Lenci?

A. Yes, sir.

Q. Now there was one other company that was engaged in the gypsum business at that time, by the name of Kelley Plaster Company. Did you know that company?

A. Kelley Plaster, I remember the name. Q. Did you know Stephen Kelley, the president?

A. I don't remember. Q. Now with National, did you know Mr. Haggerty?

Yes, sir.

Q. Did you know Mr. Williams?

A. Yes, sir.

Q. And did you know Mr. Baker?

A. Yes, sir.

Q. Now with Niagara, were you acquainted with Mr. Reeb?

A. Yes, sir.

Q. And with Texas, did you know Mr. Chism?

A. I don't remember him.

Q. Do you remember the name Gloyd?

A. I remember him.

Q. You knew him? A. I remember the name.

Q. Did you know him?

Yes, sir.

Q. With Universal, with whom were you acquainted-

Mr. Palmer?

A. I remember him.

Q. Do you remember Mr. Shearer?

A. Yes, sir.

Q. And do you remember Mr. Holland?

A, I don't remember him.

Q. You don't remember him?

A. No.

Q. And with USG, you of course knew Mr. Avery?

A. Yes, sir.

Q. And did you know any person besides that with USG?

A. Mr. Henning.

Q. Mr. Charlie Henning?

1214 A. Yes, sir.

Q. And the Chief Counsel of USG

(Interposing.) I knew him.

Q. Mr. John MacLeish?

A. Yes.

Q. Anybody else?

A. I knew several of them, but I can't remember their

Q. Are you familiar, in a general way, with the United States Gypsum litigation against Best Wall Manufacturing Company?

When I took hold of the company, the were in the

middle of a second patent suit.

Q. Are you familiar with the first suit?

A. I wasn't up until that time. Naturally I familiarized myself with it.

Q. Do you know when the first suit was started by USG against the Best Wall Manufacturing Company?

A. I don't remember that.

Mr. Bromley. I stipulate that it was 1917, if that will

Mr. KNUFF. Thank you.

By Mr. KNUFF.

Q. Do you know when that litigation was decided by the District Court, sir?

1215 A. No, sir.

Mr. KNUFF. May it be stipulated also that the District Court's decision was on the 21st day of July, 1919?

Mr. Bromley. Yes, and in favor of USG.

Mr. KNUFF. And in favor of USG.

Justice Stephens. It may be stipulated.

## By Mr. KNUFF.

Q. Do you know, sir, whether or not an appeal was taken to the CCA of the Seventh Circuit in that case?

A. We appealed and carried it to the next court.

Q. And do you know, sir, that the Circuit Court of Appeals affirmed the lower court?

A. I don't remember that.

Mr. KNUFF. May it also be stipulated that the Circuit Court of Appeals upheld the lower court on the 4th day of January, 1921?

Mr. BROMLEY. Yes, sir.

#### By Mr. KNUFF.

Q. Now, did Beaver acquire Best Wall?

A. Yes, sir. Q. In what year? A. I don't remember.

Q. Well, you came with the company when, sir?

A. It had been acquired.

Q. Do you know approximately how long before you A. Two or three years.

Mr. Knuff. May it also be stipulated that Beaver acquired Best Wall in 1920? .

Mr. BROMLEY. Yes, sir.

## By Mr. KNUFF.

Q. How did Beaver acquire Best Wall, did they purchase the capital stock of Best Wall or did they purchase the assets, if you know?

A. I don't remember.

Q. Did USG subsequently file a supplemental bill in 1921 against Best Wall and Beaver? Did they start a second suit?

A. Yes, sir.

Mr. KNUFF. May it also be stipulated, gentlemen, that a supplemental bill was filed by USG against Best Wall and Beaver on June 13, 1921?

Mr. Bromley. Yes.

## By Mr. KNUFF.

Q. Do you know when that case was decided by the District Court?

A. That is the second case?

Q. The second case, sir.

A. I don't remember the date.

Q. Do you remember the year when it was decided?

1217 A. That was after I went in.

Q. That was after you went in, sir.

A. It was around 1924, I should think.

Mr. KNUFF. May it further be stipulated that the decree of the District Court was entered on the 17th day of August, 1925?

Mr. BROMLEY. Yes, again in favor of USG.

Mr. KNUFF. Again in favor of USG, yes.

By Mr. KNUFF.

Q. Now was an appeal taken by Beaver to the Court of Appeals in that case?

A. Yes, sir. Q. Was that appeal finally decided or was it withdrawn?

A. It was withdrawn.

Q. Now between August, 1925, and December 1 of that year, were any attempts made to settle the USG-Beaver

litigation?

A. As soon as I became thoroughly familiar with the case, I made up my mind that we wanted to settle it out of court if we could, and I tried to meet Mr. Avery. first Mr. Avery didn't want to see me. Through mutual friends we met, and I kept trying to get him to settle the case out of court.

Justice Stephens. Mr. Knuff, let me enjoin the witness. We want you to feel free to make answers according to

your own recollection and memory, of course, but

it may get beyond the necessary issues unless you confine your answers strictly to the questions which are asked; so please bear quite carefully in mind the questions that are asked you, Mr. Blagden.

The WITNESS. All right.

By Mr. KNUFF.

Q. Can you fix the time when you made overtures to -Mr. Avery, if you did?

A. I started before the second case was settled in favor

of the United States Gypsum Company.

Q. Let me understand you. Is my understanding correct that even before the District Court had handed down its decision, you say you made overtures to Mr. Avery to settle the case.

A. Yes, sir.

Q. And did you continue to make overtures to Mr. Avery after the decree had been handed down, which was on the 17th of August, 1925?

A. Yes, sir.
 Q. When you say that you made overtures to Mr. Avery,

what did you do?

A. I told him that I thought there was some way we ought to get together and call it off, make some kind of a , settlement.

1219 Q. Was that by personal contact or letter?

A. By personal contact.

Q. And where did you see Mr. Avery?

A. In Chicago.

Q. On one occasion or more than one occasion?

A. Several occasions.

Q. Now my question, sir, is directed to a period before the 17th of August, 1925.

A. On one or two occasions.

Q. On one or two occasions before the 17th of August?

A. Yes.

Q. And after the 17th of August, and before the 1st of December, did you endeavor to settle the litigation?

A. Yes, sir.

Q. With whom did you take up the question of settlement?

A. Mr. Avery.

Q. Was that by personal interview or was it by letter?

A. Both.

Q. On how many occasions did you see Mr. Avery?

A. I don't remember.

Q. Well, was it one

A. (Interposing.) Two or three. Q. Two or three different times?

A. Yes, sir.

Q. Mr. Blagden, I show you what has been marked for Identification as Government's Exhib-1220 its Nos. 184 and 185. No. 184 purports to be a letter dated December 12, 1925, written by you to Mr. Avery; and Exhibit No. 185 purports to be the memorandum enclosed in that letter of December 12 I want you to read both Exhibits 184 and 185.

A. I have done so. Do you want me to read them

again? Q. Have you read Exhibit 185, sir? It is a 12-page

A. Well, I know what it is.

Q. That is your letter, sir?

A. Yes, sir.

Q. And is that the memo that was enclosed in it?

A. Yes, sir.

Q. Now, Mr. Blagden, in your letter of December 12, 1925, you make reference to a conference with Mr. Avery that was held on the preceding Thursday. Do you notice that?

A. Yes, sir.
Q. Who requested that conference?
A. I did.
Q. Who attended it?
A. I did.
Q. Who else?
A. I don't think anyone else did.

A. I don't think anyone else did.

Well, you couldn't confer with yourself, could you? A. Well, Mr. Avery, it was with Mr. Avery, of 1221 course.

Q. And where was it held, sir?

A. In Chicago.

Q. At whose offices?

A. It might have been at his office or it might have been at luncheon,—most likely at luncheon.

Q. Now then, what did you discuss?

A. Settlement of the suit.

Q. Will you relate, sir, your present recollection of that discussion -

Mr. Adams (interposing). Your Honor, may we interpose a general and usual objection to this line of testimony for defendant Certain-teed?

Justice Stephens. The same objection as you have made heretofore, to declarations of alleged co-conspirators? Mr. ADAMS. That is right, Your Honor.

Justice Stephens. The objection may be entered. Of course, the Court hasn't yet heard the statements, but if the statements are offered as statements of co-conspiraors, they are received subject to the proof of the conspiracy so far as all other defendants than USG are concerned.

Mr. ADAMS. And in order not to have to interrupt

again, I take it that what is going to develop -

Justice Stephens (interposing). Yes, I think your record is fully protected in that respect. The Court is receiving all declarations of alleged co-conspirators

subject to the proof of conspiracy, prima facie proof of conspiracy, except as the declarations may apply against the particular alleged conspirator who makes the declaration.

Proceed.

By Mr. KNUFF.

Q. Mr. Blagden, will you just relate in your own words your present recollection of what was discussed on the Thursday previous to the 12th of December? I might say, sir, if you care to use the memorandum to refresh your

recollection, I believe you may.

A. I had talked to Mr. Avery several times about settling the suit, and at first we would have to pay him a million dollars, or that was his opinion. I told him that we would like to settle, and that brought out this memorandum. I had to convince my own people, the Board of Directors and others, that it was best to settle the suit. That was why this was gotten up, to weigh all sides to see what would be best. And my meetings with Mr. Avery were to come to terms to settle the suit.

Q. I don't believe you have answered the question that I have asked you. I asked you to relate, in your own words, just what subjects you took up with Mr. Avery on the

Thursday preceding the 12th of December.

Justice STEPHENS. You want the witness to give the conversations, do you, as well as he can remember 1223 them?

Mr. KNUFF. Yes.

Justice STEPHENS. You don't have to remember the exact words, Mr. Blagden. Give the substance and effect of your conversation with Mr. Avery, if you remember it.

By Mr. KNUFF.

Q. Or the topics you talked about?

A. Well, we talked about—well, Mr. Avery felt that we had been using that edge, and therefore against his patent arrangement, and that we owed him quite a considerable amount of money for infringement of patents, and if we came to any settlement that that would have to be taken into consideration.

Q. That is, you would have to pay damages? A. That is right.

Q. All right.

A. And it was entirely on that subject that we discussed

Q. Did you discuss anything further, other than damages?

A. No, sir.

Q. Did you discuss, on the Thursday preceding the 12th of December, the subjects covered by your memorandum?

A. We hardly mentioned the memorandum. I just said that these were different sides that my attorney, Mr.

Mitchell, had drawn up and we had gone all over

1224 these.

Q. You say you hardly mentioned the memorandum. Did you mention the memorandum at all?

Justice STEPHENS. What was the date of this conver-

sation?

Mr. KNUFF. The Thursday preceding the 12th of De-

cember —

Justice Stephens (interposing). I only asked the question because one of my colleagues says that it appears that the memorandum wasn't in existence at that time.

Mr. KNUFF. That is what I was trying to bring out.

The WITNESS. I don't think we mentioned the memorandum at that time.

## By Mr. KNUFF.

Q. Was the memorandum in existence at that time?

A. I don't think it was.

Q. Suppose you read your letter of December 12, and

tell us whether it was.

A. We must have been—I told him that we had been going over all possible ways of what would be best for our company to do. We had to do that.

Q. Was it limited to what was best for your company? A. Yes, sir. We had our own company in mind, and

nothing but.

Q. And you say that at this meeting on the Thursday, you discussed the question of settlement of the suit that

USG had against Beaver?

1225 A. Yes, sir.

Q. And you discussed the question of damages?

A. Yes, sir.

Q. What else did you discuss?

A. I don't remember.

Q. State whether or not you had any disscussion concerning the transfer of any patents to USG?

A. We held certain patents, and that they would have

to be taken into consideration in the settlement.

Q. I still don't believe you have answered my question, Mr. Blagdon. Did you discuss the question of the transferring of any Beaver patents to USG? A. I don't remember, I will have to say that.

Q. You don't remember whether you discussed transferring any patents or not, is that your best recollection?

A. Right now, I can't.

Q. Did you have any discussion concerning whether or not, in the settlement of this suit, you would acknowledge the validity of USG patents?

A. Yes, sir.

Q. What was that discussion?

- A. We would acknowledge their patents and take out a license.
- Q. You say you would take out a license. Did you discuss a licensing arrangement at this time with Mr. Avery?

1226 A. I can't remember the details, but we must have.

Q. What is your best recollection now, not the details?

A. That we did.

Q. That you did?

A. Yes.

Q. So that if I understand you correctly, you had two. subjects under discussion at that time,-first, the settlement of the existing suit; and, second, the taking out of a license from USG; is that correct?

A. Yes, sir. Q. Now concerning the license that you were to take out from USG, what did you discuss about that?

A. What do you mean?

Q. Well, did you discuss how long this license was to last?

A. It would be for the duration of the patents.

Q. And do you know how long the patent under which you were going to license had to go before it expired?

A. I don't remember.

Q. Do you remember the name of that patent?

A. The Utzman patent. Q. The Utzman patent?

A. Yes.

Q. And the discussion that you had was concerning a license under the Utzman patent, is that correct?

A. Yes, sir.

Q. Now under the licensing arrangement which you say you discussed, did you have any discussion as to. who should fix the price of the product?

A. The USG.

Q. What was your discussion about that?

A. Well, that was just taken for granted; I mean, we didn't discuss that in detail.

Sin

. Q. You didn't discuss that in detail?

A. No.

Q. Did you discuss, sir, what effect USG's fixing of prices would have upon the market?

A. I don't remember, we might have discussed it in a

general way.

Q. Well, what was that discussion in a general way?

A. Well, the whole industry knew we were the guinea pig, so to speak, and that the USG was suing us, and if they won their suits all the way through it would affect the whole industry.

Q. In what way, sir? In what way would it affect the

whole industry?

A. Their patents would stand, and no one could make a folded edge board unless they made it under their patent, or they would be subject to suit the same as we were.

Mr. KNUFF. Mr. Reporter, will you read back to Mr. Blagden the question that I originally asked him? 1228 I don't believe he has given me a responsive answer.

(The question was read by the reporter.)

## By Mr. KNUFF.

Q. We were talking about the fixing of prices, and the question I asked was-in what way would the fixing of

prices affect the whole industry?

Justice Stephens. Let the Court understand, Mr. Knuff. Are you asking this witness whether he now recalls discussing that question with Mr. Avery, or are you asking him to state from his own knowledge what effect there would have been on the industry?

Mr. KNUFF. He said he had that discussion with Mr. Avery as to who should fix the price, and now my question is directed to whether or not he had any discussion with Mr. Avery as to what the effect of that fixing of

prices would be on the whole industry.

The WITNESS. I don't remember the details of that.

# By Mr. KNUFF.

Q. Well, in general, what did you say or what was discussed?

A. I don't remember. It would affect them in this way, that if they won the suit against us, all the others would be subject to that.

Q. My question, sir, is—how would the fixing of prices by USG affect the whole industry?

A. Now wait -

Mr. BROMLEY (interposing). Objected to as incompetent.

Mr. KNUFF. If Your Honor pleases, the witness has stated that he discussed with Mr. Avery the question of USG's fixing of prices. My question now is—what discussion did you have with Mr. Avery as to how USG's fixing of prices would affect the whole industry, and he hasn't

answered the question.

Justice Stephens. That is correct, Mr. Knuff, that he didn't answer that question. He has told you that he doesn't remember any discussion on that subject, and your question then was, following that, and I think the witness must have understood you to be asking him what, in his opinion, was the effect upon the industry.

Mr. KNUFF. I am not asking the witness' opinion.

# By Mr. KNUFF.

Q. Mr. Blagden, I am not asking you what your opinion was. I am asking you what discussion you had with Mr. Avery as to how USG's fixing of prices would affect the industry?

A. I don't remember discussing that.

Q. You don't remember discussing -

A. (Interposing.) At that meeting. Q. Did you ever discuss it with him?

A. We must have discussed it in a general way, yes,

Q. Well, would you look at your memorandum, 1230 and would you look at your letter, and tell us what

your best recollection is, sir?

Justice STEPHENS. You may take your time to refresh your recollection if you wish to, Mr. Blagden. You may look through this memorandum, if you wish to take the time to do so, and refresh your recollection. What you are being asked about, however, is your recollection of these conversations, in substance and effect, not your own judgment now, as to the effect upon the industry.

## By Mr. KNUFF. .

Q. Mr. Blagden, before you answer that question, suppose you take a look at that memorandum, will you, please? Justice Jackson. Your question refers to any conversations that he may have had with Mr. Avery at any time subsequent to December 12?

Mr. KNUFF. The witness answered the question that he did not discuss it at that time, and then I said-did you discuss it at any other time?

Justice Jackson. Then it goes to any time? Mr. KNUFF. Any time, yes, Your Honor.

While the witness is reading this exhibit, may we suspend for a few minutes, please?

Justice Jackson. Yes, the Court will be in recess for

five minutes.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

# By Mr. KNUFF.

Q. Mr. Blagden, just before the recess, you said that you hadn't taked to Mr. Avery at that time as to what effect price fixing would have on the industry, and I asked you then-did you talk to Mr. Avery at any other time. What is your answer to that?

Mr. BROMLEY. I don't think that properly represents

the testimony. I don't think he said that.

Mr. KNUFF. Let's refer to the record.

Justice STEPHENS. Read the question which Mr. Knuff just asked the witness.

(The pending question was read by the reporter.)

Justice Stephens. I don't quite understand your objection, Mr. Bromley.

Mr. Bromley. I'm afraid I don't, either. I see the ques-

tion is limited to this meeting.

Mr. KNUFF. Will you please read the question to Mr. Blagden?

(The pending question was read by the reporter.)

The WITNESS. In my judgment, and in the judgment of my associates, the best interests for us were to settle this suit, because we felt that we would ultimately lose out -

Justice Stephens (interposing). Mr. Blagden, what you are being asked now is-did you talk to Mr. Avery 1232 at any other time than the time which you have just finished describing?

The WITNESS. And I brought up with Mr. Avery the

points -

Justice Stephens (interposing). Will you answer that question, Mr. Blagden? Did you talk with Mr. Avery at any other time?

The WITNESS. Yes, sir.

Justice Stephens. Very well. Now proceed, Mr. Knuff.

#### By Mr. KNUFF.

Q. What did you say?

A. I told him that for our interests it would be best to settle the suit, and that I thought that we had patents which, lined up with his patents, would give them further protection, and that I was trying to put the best possible foot forward for our own company to settle the suit and to get him to come to an agreement.

Mr. KNUFF. May it please the Court, I don't want to argue with the witness, and I am appealing to the Court

to direct the witness to answer the question.

The question that I asked the witness originally was what effect the fixing of prices would have upon the industry, and he said at that time he didn't have any discussion. I then said—did you have any discussion at any other time, and my question now is directed as to what that

other discussion was as to the effect that the fixing 1233 of prices would have on the industry. I submit that the answers that I have received from Mr. Blagden

are not responsive to my question.

Justice Stephens. I think the witness is possibly confused by too many questions and too many rules. We don't wish to confuse you nor hold you down to a technical limit, Mr. Blagden. It is, of course, essential that the witness answer substantially the questions which are asked him. Otherwise we get into conversations that are outside of the issues in the case. But you don't have to remember the words of a conversation. However, you are being asked at the present time, if the Court may explain to you, not what your own judgment was then or is now as to the desirability of these arrangements, whatever they were, but you are now being asked what your recollection is. at the moment what Mr. Knuff wants to ask you about is this-if you will just listen to this question, I think I can help the discussion forward—did you, at any of these conferences which you say you had with Mr. Avery, discuss with him the effect upon the industry of the proposed settlement? Just answer that yes or no, if you remember whether you had such a discussion.

The WITNESS. I don't remember any detail of such dis-

cussion.

Justice STEPHENS. I don't expect you to.

The WITNESS. I remember we did —

1234 Justice STEPHENS (interposing). Did you discuss that subject?

The WITNESS. We must have discussed that subject.

Justice STEPHENS. Well, can you state in a general way

the nature of that discussion?

The WITNESS. That by settling our suit with them, then the others in the industry would either have to take licenses or be sued; and he would have a much better chance, with our patents all together with his own, of winning the suit with other companies. That is as I remember it.

#### By Mr. KNUFF.

Q. I don't wish to labor the question, but my question is still this—what discussion did Mr. Blagden have with Mr. Avery as to what effect the fixing of prices would have on the industry, not the effect that the settlement would have but what effect the fixing of prices would have on the industry.

Justice Stephens. Let me ask the witness that question.

First, let me ask you about your recollection. Do you remember having any discussion with Mr. Avery at any one of the meetings on the subject of what effect of fixing the prices under a license would have on the industry? Do you remember discussing that subject? If you don't, why frankly say so.

The WITNESS. I don't remember discussing it that way.

Justice STEPHENS. Well, do you remember dis-1235 cussing that particular subject in any way? I am not attempting to phrase it for you.

The WITNESS. Yes.

Justice STEPHENS. Well, what was that discussion?

The WITNESS. Well, we discussed that if he settled our suit, that he would be in a much better position to settle with the other companies, and the price that he would have with us would be the same price with the others.

Does that answer your question?

Justice STEPHENS. Is that the subject you wish to go into?

Mr. KNUFF. I don't think it is responsive, but that

is the subject I am trying to get into.

Justice STEPHENS. If you don't think it is responsive, you may move to strike it. You don't have to have in the record what the Government doesn't want to put in it.

By Mr. KNUFF.

Q. Well, let's see if we can bring out the conversation

that you had with Mr. Avery. Did you, at any time, sir, have any discussion with Mr. Avery as to what effect the fixing of prices would have on the industry? Do you understand my question, sir? If you don't, I will try to restate it.

A. I don't remember discussing it in that way at all.

Q. Well, how did you discuss it?

A. I have just given you how I discussed it, that if he settled the suit with us, he would be in a better position to settle the suit with the others in the industry.

Q. And my question relates to the fixing of prices, Mr.

Mr. JOHNSTON. May I inquire; if the Court please? presume counsel is talking about the prices of wallboard under these license agreements?

Justice Stephens. I have assumed that,

Mr. Johnston. He is using the term generally, and if he intends it generally, then I would move that he be restricted to that.

Justice STEPHENS. You are asking about the fixing of the prices of wallboard under the license agreements pro-

posed, are you not?

M. KNUFF. That is right.
Justice Stephens. The Court so understood the ques-

tions, Mr. Johnston.

The WITNESS. If we settled our suit with the United States Gypsum Company, the price would be fixed by the USG with us, and if he won the suits with the other companies that the same price would prevail with them.

## By Mr. KNUFF.

Q. What price?

A. I don't know.

Q. Well, what do you mean when you say the "same prices"?

A. The price of wallboard.

Q. That is, that if other companies took out a license, they would also have to sell at the same price, is that what you mean?

Mr. BROMLEY. I object to that as leading, if the Court

Justice Stephens. Well, that is a very critical point, and we think the witness ought not be led on that point. The Court wishes to give you every proper latitude to probe the witness' recollection, but I think that objection should be sustained.

Mr. Knuff. Well, I am still going to hammer at the conversation and see if I can get the answer to it.

By Mr. KNUFF.

Q. Mr. Blagden, you were first asked—did you have any conversation with Mr. Avery on the Thursday preceding the 12th of December, concerning the fixing of prices and what effect that would have on the industry?

A. I don't remember.

Q. And your answer to that was that you didn't at that time.

Now I ask you, at any other time did you have any conversation with Mr. Avery as to what effect the fixing of prices would have on the industry?

Mr. OLIVER. I am going to object to that question, Your Honor, for the reason that it assumes that there was a discussion concerning the fixing of prices, and the witness has never said there was.

Mr. KNUFF. I appeal to the record.

Justice STEPHENS. I doubt if the question assumes that. Read the question.

(The pending question was read by the reporter.)
Justice Stephens. Your objection is overruled.

The WITNESS. I don't remember discussing it that way.

#### By Mr. KNUFF.

Q. Well, what way did you discuss it?

A. I say at any time discussing it that way.

Q. Well, how did you discuss it at any time?

A. I told you that if we settled this suit, Mr. Avery and his company would have been in a much better position to settle with the others in the industry.

Q. Did you point that out to Mr. Avery?

A. We discussed that, surely.

Q. And can you recall just exactly what your discussion was, in a general way? I realize that that was in 1925.

A. Our company, being the next largest in the industry, and with our patents and his patents, if we could come to an agreement and settle the suit, he would be in 1239 a much better position to settle with the others making the board.

Q. State whether or not you pointed out to Mr. Avery

how he would be in a better position?

A. By having our patents and his patents—they were practically all the folded edge patents.

Q. And you pointed that out to Mr. Avery?

A. Yes, sir.

Q. That if he had your patents and combined those with his patents, he would be in a better position to—

A. (Interposing.) I was using everything I could to make the best arrangement I could make with the least

cost.

Q. Now we will go back to the Thursday preceding the 12th of December, and when you talked about the license agreement what else did you talk about that license agreement should contain? You have mentioned the term of the patent, and you have mentioned that the USG should fix the prices. Now what else did you talk about that should be in that license?

A, I,don't remember anything else.

Q. Did you talk about a royalty, the amount of royalty?

A. Oh, we would have to pay a royalty, we understood that.

Q. Did you talk about whether or not the license agreement should contain a provision acknowledging the validity of USG's patents?

1240 A. Yes, we acknowledged the patents, yes, sir.

Q. Now between December 12, 1925, and June 1, 1926, did you have any further conferences with Mr. Avery?

A. I don't remember when it was, but we decided that we would get together and settle the suit; that was along

about that time, as I recollect.

Mr. KNUFF. May it please the Court, as a part of the direct-examination of Mr. Blagden, I would like to offer in evidence as an admission of USG, USG's answer to Interrogatory No. 22. Interrogatory No. 22 reads as follows:

"So far as we have definite information there were two meetings between Sewell L. Avery, President of the United States Gypsum Company and Augustus S. Blagden, President of Beaver Products—

Justice Stephens (interposing). Are you reading the Interrogatory or the answer?

Mr. KNUFF. I am reading the answer.

Justice Stephens. Read the Interrogatory so the Court can understand what the answer is responsive to.

Mr. KNUFF. I am sorry that I don't have the Interrogatory to read it verbatim.

Justice STEPHENS. I think that possibly I have it here. What Interrogatory is it?

Mr. KNUFF. Interrogatory No. 22.

1241 Justice STEPHENS (reading).

"State the dates and places of all conferences or meetings held during the period from September 1, 1925 to April 1, 1926, between your representatives and representatives of Beaver Products Company, Inc., and The American Gypsum Company, or of either of said companies, and the names of all such representatives present at each of such conferences or meetings, in any way relating to (1) settlement of pending litigation between you and Beaver or American, (2) the issuance of a license to Beaver or American or to any other company by you and state the substance of what was said by each person present at said conferences or meetings."

What is the answer you want to put in?

Mr. KNUFF. The answer of United States Gypsum Company served on the plaintiff on September 10, 1943, reads

as follows:

"So far as we have definite information there were two meetings between Sewell L. Avery, President of the United States Gypsum Company and Augustus S. Blagden, President of Beaver Products, Inc., one in December 1925, and the other in February 1926, relating to the possibility of a settlement of litigation then existing between United States Gypsum Company and Beaver Products, Inc. and to the possibility of the issuance of a license by United States Gypsum Company to Beaver Products, Inc. The

former meeting occurred in Chicago, Illinois, and

1242 the latter in New York, N. Y."

We are offering that as an admission of USG that there were conferences between Mr. Avery on the one hand, and Mr. Blagden on the other, at this particular time.

Mr. Bromley. I think the record should show that the last clause which Your Honor read from the Interrogatory, beginning, "and state the substance", was stricken out when this Court settled the Interrogatories. So it is not a part of the Interrogatory as addressed to us, and that is why there is no answer to it.

Justice STEPHENS. Yes, I think that is correct, and the

record may so show.

Mr. KNUFF. That is correct.

Justice STEPHENS. I was reading the Interrogatory in the form originally presented to us. The record may show that correction.

Do you have any objection, Mr. Bromley? Mr. BROMLEY. No, sir. Justice Stephens. It may be admitted in evidence and

may be marked as an exhibit.

Mr. KNUFF. I haven't any objection to having it marked as an exhibit. I don't know as it is necessary, but if the Court wants it marked as an exhibit -

Justice Stephens (interposing). Perhaps it isn't necessary to mark it as an exhibit. It may be shown as an ad-

mission in the transcript of the record. I thought

1243 perhaps you wanted it marked.

Mr. KNUFF. No, Your Honor.
Justice STEPHENS. The Court doesn't require it to be marked. It has been sufficiently identified now, and the Court Reporter has taken the Answer, has he not?

The REPORTER. Yes, sir.

Justice STEPHENS. You might show it to the Reporter at the noon hour, to be sure he gets it correct.

Mr. KNUFF. Very well.

#### By Mr. KNUFF.

Q. Between December 12, 1925, and June 1, 1926, did you have any conferences with Mr. Avery concerning the settlement of the USG-Beaver litigation?

A. I don't remember.

Q. Mr. Avery admits that he had two conferences with you, one in Chicago and one in New York. With that in mind, can you tell us whether you had those conferences or whether you had more than those conferences?

A. I guess that is about right.

Q. That is correct? A. Yes.

Q. Do you recall what was said at the conference in New York, in February?

A. I don't remember what we talked about.

Q. Do you recall what you discussed? 1244

A. We discussed settlement, most likely.

Q. Do you recall any of the conversations you had?

A. No, sir. Q. During this period, that is from December 12, 1925, until June 1, 1926, did you have any correspondence with Mr. Avery concerning the settlement of this suit?

A. I don't remember.

Q. Did you have any telephone conversations with him?

A. I don't remember.

Mr. KNUFF. Would you show the witness Exhibit 104. please?

(Exhibit No. 104 handed to the witness.)

Justice GARRETT. What "D" number is that? Mr. KNUFF. D-4.

By Mr. KNUFF.

Q. Mr. Blagden, that is a letter not written by you.

A. This is in 1926. Q. It was a letter written by Mr. Griswold to Mr. J. H. McCrady. Would you read the first paragraph of that letter? You will notice, Mr. Blagden, that the second sentence states that you had had one or two interviews with Mr. Avery "on the matter of settling all disputes and litigations between the wall board manufacturers by entering into a licensing arrangement and the thing looks very

favorable." Is that correct, that you had the inter-

views? 1245

A. With Mr. Avery?

Q. My question is, looking at the second sentence, did

you have the interviews that are there referred to?

A. I only remember having interviews with him on discussing our own settlement. I remember that we had two or three meetings, several meetings in Chicago on other subjects, and naturally at some of them there we would discuss the board question.

Q. Then your answer to my question—or what is your

answer to my question?

Mr. Bromley. He has answered it, if the Court pleases.

I object to this as repetitious.

Justice Stephens. I think the witness has freely answered that he has had at least two and perhaps other conversations with Mr. Avery. He doesn't place them exactly, I think your record is fully protected, at least, by your answer.

Mr. Knuff. I think the witness has said that. Now the question that I have directed to the witness is—did he have the interviews that are set forth in the second sentence of the first paragraph?

Mr. Bromley. I object to it as repetitious on the ground

that he has answered it.

Justice STEPHENS. The Court calls your attention, Mr. Blagden, to the fact that this second sentence refers to "one or two interviews with Avery on the matter

of settling all disputes and litigations between the wallboard manufacturers by entering into a licensing arrangement \*. \* \* "\_

The WITNESS (interposing). I don't remember -Justice STEPHENS (interposing). Just a moment. you remember discussions on that broad a subject?

The WITNESS. No. sir.

Mr. KNUFF. That is very responsive to my question.

#### By Mr. KNUFF.

Q. Look at the last sentence in the letter, Mr. Blagden, beginning with, "According to the plants",-

A. I don't remember anything like that.

Q. You haven't waited for me to ask the question yet.

A. I beg your pardon.

Q. Did you have any plan for holding the price of wallboard steady for the next fourteen or fifteen years?

A. No. sir.

Q. You didn't?

A. No.

Mr. KNUFF. We now offer in evidence Government's Exhibit 184 and Government's Exhibit 185, identified by the witness.

Justice STEPHENS. Any objection?

Mr. JOHNSTON. If the Court please, I am like the bad penny, I keep coming back. I don't know what these are, I

have never seen them. Over the Thanksgiving recess I withdrew from the Reporter Exhibits 101 to

183, inclusive, and at an expense of \$40 or \$50 had photostatic copies made of them, and returned them this morning. I haven't yet had an opportunity to read those exhibits.

Now I come back to the same thing I raised earlier in the trial. I think the Government should, and I now so move the Court, furnish counsel for defendants with copies of these exhibits as they offer them, or before they offer them, so we may know what they are. I haven't the slightest idea in the world what is in these exhibits, and we are

proposing now to pass on the admissibility -

Justice STEPHENS (interposing). Well, the Court will interrupt you long enough to say, Mr. Johnston, that the Court is not going to pass upon the admissibility of any exhibit until defendants' counsel have had an opportunity to inspect it and read it and satisfy themselves whether they want to make an objection. And whether or not copies can be furnished as conveniently as desired, I will now have to inquire of the Government again.

Mr. KNUFF. I would like to say this, that when I identified the exhibit, I passed over at the same time to defense attorneys copies of Exhibits Nos. 184 and 185, and I believe that they are available for Mr. Johnston. Does that answer your question?

Justice STEPHENS. Mr. Johnston raises this point, Mr. Knuff, which was raised about a week ago, and that is that it might save the time of the Court and counsel and everyone concerned if the Government could get enough photostats of these proposed exhibits, and get them far enough in advance, so that we wouldn't have to interrupt the trial while counsel for the defendants inspect them. The same courtesy will be expected, of course, when the defendants are producing exhibits, for the Government. But the Government raised the question as to whether or not it could get enough priorities on photostat paper to be able to do that. Now if you.can, and with not unreasonable expense, get the photostats and furnish them to the defendants in advance of the day when they are going to be offered, of course it would be a great convenience to all concerned, including the Court, and save court time. Of course, if you can't do that, we will have to adjourn from time to time so that the defendants can inspect these exhibits. They have got a right to inspect them.

What is the situation?

Mr. KNUFF. The situation is this, Your Honor: The day that you brought that subject up, as soon as I left Court I went to our Administrative Office in our Antitrust Division, and took up with Mr. Avery Johnson the question of furnishing additional photostats. I told Mr. Johnson that it

was a source of very great inconvenience over here 1249 at the Court, not only to the Court but to ourselves and counsel for the defendants, not being able to have additional photostats, and I asked authority to have additional photostats made. And Mr. Johnson told me that he appreciated very much the dilemma that the Court was in, and he could appreciate very much the dilemma that the attorneys for the defendants were in, but he told me that in view of the fact that photostatic paper has a very high priority, that when he authorized five copies of the original exhibits to be photostated he felt that he had gone far beyond what he should have done, and he said that in the present state of the emergency it would not be possible to have additional photostats made.

I might state to Your Honor that, like Ivory soap, practically 99-44/100 per cent of all the exhibits that we will offer in this case have been taken from the files of the defendants. They know what is in their files, or should know what is in their files. There may be one or two, or a very small percentage of the exhibits that we will use

here, that did not come from the files of the defendants.

Justice STEPHENS. Well, that is true, Mr. Knuff, I assume. But nevertheless, these transactions are remote in time, and defendants' counsel may not be familiar with the detail of all of these exhibits. Some arrangement must be made; if you can't make them, if the Government can't

get itself a priority on paper enough to make these 1250 additional exhibits, we will have to adopt some

other expedient.

Mr. KNUFF. Does Your Honor have any suggestion? I will try to follow it through.

Justice Stephens. I am sure you will.

Mr. Johnston. May I make the further suggestion, it the Court please. I take serious issue with this question about priority. I made inquiry here, and we have had this work done in New York. I have made inquiry at my home, and with commercial concerns there is apparently no question of sufficient paper to do their work. And if private concerns can get the paper, I don't see why the

Government can't get it.

I presume that the Government has taken many of these records from the files of the defendants, but I have no access to the files of USG or the other defendants, and they might just as well all be in the hands of the Government originally, so far as my privilege prior to their being offered here goes, in the matter of inspecting them. And I think the Court has the power, and I ask that it be invoked, and that the Government be required to furnish us in advance of the offer of these several hundred exhibits, in the interest of economy of this trial. It is going to take us weeks and weeks longer. Here is an exhibit of 12 pages, this memorandum, and I am being asked in a few minutes to go through that and analyze it and determine whether or not I want to object to it—

have to interrupt you at that point, Mr. Johnston. You are not going to be asked to do that. The Court will not rule on any exhibit until counsel for the defendants have had an opportunity to inspect it, and a reasonable opportunity. The Court will suspend ruling on it until

tomorrow if necessary.

Now you may proceed with any other statement you

want to make.

Mr. Johnston. I think that is about all I have to say. I am just in this predicament, and I think the Government should do it. I think they can get the paper, and I think

they should be required to do it.

Justice Jackson. Would it help you, Mr. Johnston, to take my copy of these exhibits that are about to be introduced? You may do so. I can use Judge Stephens'.

duced? You may do so. I can use Judge Stephens'.

Mr. JOHNSTON. I wouldn't do that for two reasons.

First, I think it is just as essential, perhaps more essential, that the personnel of the Court have these before them while the matter is being discussed. And in the second place, examining them here at the moment they are being offered doesn't do me any good. If I could have them the day before, so that the night before I could work on them and come in——

Justice STEPHENS (interposing). I was about to make that suggestion, Mr. Johnston, if I may interrupt again in the interests of speed. We are quite doubtful

whether the Court has authority to compel the Government to furnish, to print and furnish photoof course, it is going to be a grave inconvenience to the Court if the Court has to interrupt its proceedings, which are already interrupted too much because of the necessity of adjournments for the sitting of the Court of Customs and Patent Appeals. If we have to be interrupted in addition to that with the time for the study of exhibits, it will prolong this trial unduly. And it would be a great convenience to the Court, which we think the Government ought to comply with if it possibly can, if these exhibits could be printed in large numbers and distributed. to defendants in advance. But we doubt whether we have the authority to compel the Government to do that. We haven't any control over the funds of the Executive Branch of the Government. We can make a serious and have made a serious and earnest request of the Government to do that, but I don't think we can compel it.

Now the other expedient would seem to be this, Mr. Knuff: You must have prepared this case, as you obviously have, very painstakingly. Can't you know a half a dozen days in advance what exhibits you are going to offer, and can't you lend the photostats of those exhibits to the defendants' counsel a half dozen days in advance? Or, for example, hand them at the beginning of a recess,

hand them the exhibits which you are going to use after the recess—I mean a several days' recess.

Can't that be done?

Mr. KNUFF. Well, I want to first assure the Court that I will cooperate in every way.

Justice STEPHENS. I am sure you will.

Mr. KNUFF. But I don't believe that we will know—and I am not splitting hairs—I don't think we will know a half dozen days in advance just what exhibits are going to be placed in evidence. We thought we would know that when we called Mr. Griswold. As a matter of fact, there are probably 20 to 25 exhibits that weren't used with Mr. Griswold, and some exhibits were used with him that we didn't anticipate at the time.

Now we will probably know maybe the day before what exhibits we are going to introduce, and I will say that we will give the defendants' counsel copies of the exhibits as we introduce them or, if it can be arranged, to allow counsel for the defendants to look at them the night be-

fore.

I am only a junior counsel in this case, and I would have to, of course, take that up with Mr. Steffen. I believe Mr. Steffen, of course, will accede to the Court's desires.

Justice Stephens. In addition to that, will you please say for the Court to the Chief of the Anti-Trust Division, Mr. Berge, that the Court makes an earnest request of the Department of Justice to get additional photostatic copies of these exhibits and that the Court thinks that that ought to be done, as otherwise the inconvenience to the Court, as well as to all the officers of the Court, is such that this case will be unduly prolonged at consequent expense to all persons concerned, including the Government?

Mr. KNUFF. I will be glad to convey that to Mr. Berge, and I think probably if I do that, Mr. Berge will say, "Get

them photostated."

Justice STEPHENS. Very well, then that is what we want. So far as these particular exhibits are concerned, Mr. Johnston, the Court will not rule upon the admissibility of these two proposed exhibits until you have had an opportunity to inspect them, and other defendants' counsel have had a like opportunity. The record may show that they have been offered, but that no ruling is now made as to their admissibility.

Mr. KNUFF. I wanted, if your Honor please, to read Ex-

hibit 185.

Justice STEPHENS. I think counsel for the defendants are within their rights not to have the matter presented formally to the Court until they have had an opportunity to make an objection. So if you feel that your case re-

quires-which one is that?

1255 Mr. KNUFF. That is the thirteen-page memorandum.

Justice STEPHENS. You mean you want to read that whole memorandum into the record?

Mr. KNUFF. I say it with some misgivings, that I may not be able to have it get into the record, but I was going to make the effort.

Justice STEPHENS. Well, you are entitled to make the effort, although the Court has ruled that exhibits as such, since they are in the record, need not be put into the transcript. That is an additional and unnecessary expense. The Court will read them very carefully itself. Now it seems to me that this matter can be disposed of at the present time, by a ten-minute recess, in which defendants' counsel and the Court can read this exhibit. Could you read it during that length of time, Mr. Johnston? I don't mean to limit you to that.

Mr. JOHNSTON. I don't know what it is yet.

Mr. KNUFF. It is almost approaching the noon hour— Justice Stephens (interposing). Have you any other testimony that you could proceed with until twelve-fifteen?

Mr. KNUFF. With this witness?

Justice STEPHENS. Yes. Mr. KNUFF. I have a lot.

Justice Stephens. Then go ahead with the witness on some other subject until twelve-fifteen, and perhaps dur-

ing the noon hour, by a quarter of two, we will all 1256 have been able to read this exhibit.

#### By Mr. KNUFF.

Q. Mr. Blagden, I would like you to look at Government Exhibit No. 1, please, and will you state, Mr. Blagden, if your signature appears on that? Government Exhibit No. 1 is the license agreement between USG and Beaver, dated the 29th day of July, 1926. I don't believe your Honors have a copy of that.

Justice STEPHENS. No, but I think the Clerk has. Isn't that the 1926 license agreement between USG and Beaver,

printed in the appendix to the brief?

Mr. KNUFF. It appears in the complaint at page 38.

Justice STEPHENS. That is right, I have it.

The WITNESS. That is my signature.

By Mr. KNUFF.

Q. Where was that executed, Mr. Blagden?

A. I think in Chicago.

Q. State whether or not, prior to the execution of that agreement, you had conferences concerning it.

A. Yes, sir.

Q. Do you know how many conferences you had?

A. I can't remember, we had several.

Mr. KNUFF. As a part of the direct examination, your Honor, we offer in evidence as an admission of USG, USG's answer to Plaintiff's Interrogatory No. 23. Interrogatory

No. 23 was as follows:

or meetings held during the period from April 1, 1926 to May 1, 1927 between your representatives and representatives of any other companies manufacturing gypsum board at that time or any time thereafter, in any way relating to the issuance of licenses by you under any patent owned by you. State the names of all companies represented at each of said conferences or meetings, the names of the representatives of each of said companies, the names of all other individuals present at each of said conferences or meetings, and state the substance of what was said by each person present at said conferences or meetings."

Now that last portion, "and state the substance of what was said" your Honors have previously passed upon that, and have sustained the objections that the defendants have

raised to that portion of the interrogatory.

The answer to Interrogatory 23 appearing as 23 (b) is

as follows:

"As presently advised, there were the following meetings:

(b) June-July, 1926; Chicago, Illinois. Numerous meetings were held between Sewell L. Avery, President of the United States Gypsum Company and Augustus S. Blagden, President of Beaver Products, Inc., and/or their respective attorneys, John E. MacLeish and J. McC. Mitch-

ell. The dates of such meetings were: June 15, 1258 June 16, June 17, June 21, July 7, July 8, July 9, July 10, July 22, July 23, July 24, and July 29,

1926."

I believe that that makes twelve different dates on which conferences were held.

Justice STEPHENS. Is there any objection?
Mr. Bromley. No objection.

Justice Stephens. It may be recorded as a part of the transcript.

By Mr. KNUFF.

Q. During those twelve days that you were in Chicago, what discussion did you have—

Mr. Bromley (interposing). I object to that as assuming facts not in evidence. This interrogatory doesn't indicate that he was in Chicago during those twelve days.

Mr. KNUFF. I submit

Justice STEPHENS (interposing). Hand the answers to the interrogatories to the reporter, Mr. Knuff, and let the Court see them.

(The answer to the interrogatories referred to were

handed to the Court.)

Justice STEPHENS. The answer does not state, Mr. Knuff, that this witness was present at each of the twelve meetings. The objection is sustained. You can ask him how many meetings he was present at, if he remembers.

#### By Mr. KNUFF.

1259 Q. How many meetings did you attend, of those meetings?

A. Two or three.

Q. And with whom did you confer?

A. With either Mr. MacLeish or Mr. Avery. Q. And what was discussed at those meetings?

A. The drawing up of this contract.

Q. That is, when you point to "this contract", you are referring to the contract of the 29th of July, 1926?

A. Yes, sir.

Q. Will you look at paragraph No. 1 of that contract, and look at the first unnumbered paragraph following? It begins, "It is expressly agreed and understood".

Justice STEPHENS. Which paragraph do you mean?

Mr. KNUFF. It is the last paragraph, if your Honor pleases, at the bottom of page 39 of the complaint. It is the first unnumbered paragraph following paragraph No. 1.

Justice Stephens. It commences, "It is expressly agreed

and understood"?

Mr. KNUFF. That is right. May I point out to the witness where that is?

Justice STEPHENS. Surely.

Mr. KNUFF. Apparently, your Honor, there is some discrepancy between Government's Exhibit No. 1 as intro-

and the same of th

duced here, and Government's Exhibit No. 2.

Justice STEPHENS. Well, it is important that the Court be advised of that, because we, not having photo-1260 stats of this exhibit, are relying upon the exhibit

printed in the complaint.

Mr. KNUFF. I can't understand the discrepancy, and I am somewhat surprised that there is any discrepancy here. I felt all along that Exhibit No. 1 that was introduced here was the license agreement that was entered into, and I felt that we had correctly set it forth in Exhibit No. 2. Justice Stephens. Which is correct, the exhibit or complaint?

Mr. KNUFF. I don't know until I check on it, I am sorry. I think we have caught the discrepancy. Government Exhibit No. 1 is the paper of settlement, settling the dispute between USG and Beaver, and appended to that paper of settlement is the license agreement of the 29th of July, which is referred to in the complaint on page 38.

Justice STEPHENS. Well, that is Exhibit No. 2 on page 38 and following of the complaint, is that the license agree-

ment itself, or is that the settlement agreement?

Mr. KNUFF. Exhibit No. 2 is the license agreement. Justice Stephens. That is Exhibit No. 2 of the complaint?

Mr. KNUFF. That is right.

Justice STEPHENS. Then you can correct your record by offering only that part of Exhibit 1 which is the license agreement.

Mr. KNUFF. Well, I would like, if your Honor pleases, to amend the offer as to Exhibit No. 1, so as to include both the paper of settlement and the license agreement of July 29, 1926.

Mr. BROMLEY. There is no objection.

Justice Stephens. The offer may be amended and that may be received in evidence.

The WITNESS. Yes, sir, I have read it.

By Mr. KNUFF.

Q. You have read the paragraph, sir?

Yes, sir.

Q. What discussion, if any, did you have concerning that particular paragraph? Now, if you can detail the discussion, all right, but if you cannot, give us your best recollection.

Well, it was understood that the U: S. Gypsum Com-

pany would fix the price, the minimum price.

Q. When you say "it was understood", what do you mean by "it"?

A. I mean in discussing the settlement it was more or

less taken for granted that USG would fix the price.

Q. And you took it for granted that they would fix the price?

A. Yes, we signed up with that understanding, that the

licensor would set the price.

- Q. And you were perfectly willing to allow the USG to fix the price, is that correct?

  A. Right.
- Q. Well, was there any discussion then on this particular paragraph?

A. I don't remember any.

Q. Would you turn to paragraph 2, following that, beginning, "The licensee further agrees to pay five per cent", and so forth?

A. Yes, sir. Q. Was there any discussion concerning that paragraph,

Mr. Blagden?

A. I don't remember any. There must have been the regular sparring back and forth as to what it would be,

but just what it was, I don't remember.

Q. You will notice, sir, that according to the terms of this paragraph, you were to pay five per cent of the selling price on all board manufactured by you, is that your understanding?

A. That is right.

Q. And did you desire at that time to manufacture anything else other than a close-edged board?

A. No. sir.

Q. You didn't desire to manufacture anything else?

A. No, sir.

Justice Jackson. You mean any other kind of board? Mr. Knuff. Any other kind of board than a closed-edge board, yés. The WITNESS. No, sir.

1263

#### By Mr. KNUFF.

Q. So it was your intention, then, that if you were granted a license, you would manufacture nothing but a closed-edge board?

A. Right.

Mr. Bromley. I object to that as leading and suggestive and move to strike the answer.

Mr. KNUFF, What was your intention

Justice Stephens (interposing). Just a moment, let the Court rule. Read the question, Mr. Reporter.

(The last answer was read by the reporter.)

Justice STEPHENS. It is leading and may go out. Ask him what the agreement was.

#### By Mr. KNUFF.

Q. What was your intention, sir, as to the type edge board you were to manufacture?

A. By signing this, we intended to manufacture the

closed-edge board.

Q. Would you look at paragraph No. 9, sir?

A. Yes, sir.

Q. What was the purpose of that paragraph?

A. That the board we manufactured was according to the license.

Q. Which license?

A. Of this agreement.

Q. Well, according to the license "of this agreement"-I don't know as' I understand what you mean by that.

Justice Stephens. Let the Court take time to read that paragraph. I am not sure we understand it yet.

Now proceed and ask the question again.

#### By Mr. KNUFF.

Q. What was the purpose of that paragraph, Mr. Blag-

den, paragraph No. 9?

A. That the board that we would manufacture thereafter would be subject to this patent arrangement that we entered into herewith.

Q. Who insisted upon this paragraph going in?

A. I don't remember. Q. What was your understanding of paragraph No. 9? Mr. Bromery. I object to that as immaterial and incompetent. The agreement speaks for itself.

Justice Stephens. Do you wish to be heard, Mr. Knuff? Mr. KNUFF. I think that the state of mind here is quite

material, your Honor, as to what his understanding was. Justice STEPHENS. Well, he has answered it once, but of course you are entitled to go into the discussions and bring out what the parties were doing, attempting to accomplish, in these discussions. But this question asks really for an interpretation of this paragraph by the witness. I think the objection is well taken. Sustained.

1265

Q. What machine, sir, prior to the agreement of the 29th of July, was Beaver using to manufacture their closed-edge board?

A. We were using our own machine.

Q. Were you using the Birdsey machine patented under

letters patent 1,330,413?

A. I don't remember. I don't remember whether the board we were making was folded exactly the same way as that.

Q. I am not asking about the board, I am asking about

the machine.

A. Well, the machine directs the folding of the board, and the machine we were using, I am not exactly sure that it used the exact detailed way of making the board that the Utzman machine did.

Q. Will you look at paragraph No. 13, sir -

Justice Stephens (interposing). Before we go into that, the Court will take the usual noon recess. Before announcing the recess, there are a number of exhibits in these books which have been furnished to the Court; in addition to this memorandum, there are apparently a number of letters. Are you going to examine this witness on those exhibits du ing the afternoon?

Mr. KNULF. Very, very shortly. There are only twelve,

I believe, altogether.

Justice STEPHENS. I am asking the question to suggest that you are, you submit them to counsel for defendants during the noon recess. They are short letters and counsel may be able to examine them during that length of time.

Let me say also, Mr. Knuff, that I think the episode of this morning, and the discrepancy between Exhibit 1 as originally marked and as it is now offered, indicate that the Court itself ought to insist upon having photostats for the Court, each member of the Court, of these license agree-They apparently are critical aspects of the case.

So please include within the Court's urgent request of Mr. Berge, that the photostats include these license agreements for the Judges, so that we each can have one.

Mr. KNUFF. I probably should have told your Honor that I have authority to get the license agreements photostated for the Court.

Justice STEPHENS. Thank you very much.

(Whereupon, at 12:15 o'clock p.m., a recess was taken

to 1:45 o'clock p.m. of the same day.)

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#### AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m. pursuant to recess.)

Justice STEPHENS. Proceed, gentlemen.

Whereupon, Augustus S. Blagden, the witness on the stand at the time of the recess, resumed his testimony as follows:

Mr. Johnston. May it please the Court, during the noon hour I obtained Exhibits 184 and 185. I would like to ask the witness a question or two on which to predicate an objection, if I may.

Justice STEPHENS. On voir dire as to his recollection?

Mr. Johnston. Yes, on his examination.

Justice STEPHENS. You may do so.

Mr. KNUFF. Just a moment, as I understand Mr. Johnston, he said on my examination. It looks to me as if he was going to cross-examine this witness—

Mr. JOHNSTON (interposing). May I ask have you of-

fered these exhibits?

Mr. KNUFF. Yes.

Justice Stephens. I am not permitting you to cross-examine at this time except as to the qualifications of this witness to identify and recollect these exhibits.

Mr. Johnston. I merely want to have him identify this

Exhibit 185.

1268 Justice STEPHENS. That is proper, you may do that.

Mr. KNUFF. The witness has already identified it, your

Honor. He said it was enclosed in the letter.

Justice STEPHENS. Well, the request is for an examination on voir dire, and that is not irregular at this time, Mr. Knuff. Proceed briefly, Mr. Johnston.

By Mr. Johnston.

Q. Who was your attorney?

A. James McCormick Mitchell.

Q. Isn't it a fact, Mr. Blagden, that this Exhibit 185 was not prepared by you, but was prepared by this attorney?

A. That is right.

Q. And that was prepared after this Thursday meeting in Chicago with Mr. Avery?

A. That is correct.

Mr. Johnsson. On behalf of Mr. Gloyd we object to

Exhibit 185, reading it with 184. It is wholly apparent that it has no materiality whatsoever as to this defendant. It wasn't even prepared by this witness—

Justice Stephens (interposing). You mean as to your

client?

Mr. JOHNSTON. Yes, the Texas Cement Plaster Company.

It is merely what I assume purports to be a sales talk on the part of counsel to try to settle a lawsuit.

Mr. KNUFF. I think that goes to the weight of the exhibit rather than to its admissibility.

Justice Stephens. Well, the Court has a little question—I will be glad to hear you on it before I resolve the question—I have a little question as to the relevance of 185. Are you offering it as an exhibit itself or merely as a basis of refreshing the recollection of the witness?

Mr. KNUFF. We are offering that, if your Honor pleases, as a declaration of a co-conspirator made in pursuance of

the conspiracy.

Mr. JOHNSTON. If the Court pleases, it is not his declara-

tion at all.

Justice Stephens. That may be true in one sense, Mr. Johnston, but on the other hand he has testified that it was prepared by his lawyer, that he knew of its contents and referred to it in his conversations, and I should think that it might be argued that your objection goes to the weight as a declaration, and that the evidence may be interpreted as meaning that he adopted it. I think that the objection should be overruled. The exhibit is received unless there are objections by other defendants, subject to the usual reservation that it is not binding on the co-conspirators unless there is prima facie evidence of the conspiracy otherwise proved. Have you offered Exhibit 184?

Mr. KNUFF. I offered both, your Honor, both 184 and 185, and ruling on both of those was deferred pending Mr. Johnston's opportunity to examine them.

Justice STEPHENS. Are there any other objections by other defendants? If not, the same ruling with respect to 184.

The documents referred to, marked as "Government Ex-

hibits Nos. 184 and 185", were received in evidence.)

DIRECT EXAMINATION (resumed) by Mr. KNUFF.

Q. Mr. Blagden, just before the noon recess, I believe you testified that it was assumed that USG would fix the prices. Do you recall that testimony? A. Yes, sir.

Q. Did you raise any objection as to USG's fixing of those prices?

A. No, sir.

Q. State whether or not you were agreeable to having USG fix the prices of the product covered by the patent.

A. We were.

Q. I also referred you to paragraph No. 13 of the license.

Mr. KNUFF. May I have just a moment, your Honor?-Justice Stephens. Yes.

By Mr. KNUFF.

Q. Would you please read paragraph No. 13, Mr. Blagden? I am particularly interested in the last half-dozen sentences.

A. Yes.

Q. Now at the time this license agreement was executed, did you have any discussion as to other companies becoming licensees of USG?

A. I don't remember.

Q. You don't remember whether you had any discussion or whether you did not, is that it?

A. Yes, at this time.

Q. At whose insistence was paragraph No. 13 inserted in the license agreement?

A. I don't remember that, I imagine at Mr. Mitchell's.

Q. Not what you "imagine", sir, but what is your best recollection?

A. I don't remember.Q. Did you insist on it?

A. No, sir, I don't remember. I know that I wanted to be treated equally with anyone else.

Q. And was that discussed at the meeting?

A. It must have been.

Q. Is that your best recollection now?

A. I don't remember.

Q. All right, sir. At the time this licensing agreement was executed, you also settled the suit that USG had against you, is that correct?

1272 A. That is right.

Q. Will you tell the Court, please, briefly, just what the terms of that settlement were, how much cash was involved, and anything else?

Mr. BROMLEY. It is all in the settlement agreement, if

the Court pleases.

Justice Stephens. Was that a part of the settlement agreement?

Mr. KNUFF. It was: I still would like to have an oppor-

tunity of having the witness explain it.

Mr. BROMLEY. I don't think it needs explanation. The

settlement is perfectly clear from the agreement.

Justice STEPHENS. That is the portion of the agreement which was introduced this morning by modification of Exhibit No. 1, is it not?

Mr. KNUFF. Yes.

Justice STEPHENS. If that license agreement is before us, this witness' interpretation of it is not competent.

Mr. KNUFF. I am not asking him for that, I am asking

him what the agreement was...

Justice Stephens. His interpretation of that would be

incompetent.

Mr. KNUFF. What is the ruling of the Court on it, please?

Justice Stephens. Sustained.

By Mr. KNUFF.

Q. Were any patents transferred at that time, Mr. Blagden?

Mr. BROMLEY. The same objection, that is also covered.

Mr. KNUFF. May I finish my question, please?

Mr. BROMLEY. Excuse me.

By Mr. KNUFF.

Q. Were any patents transferred at the time this license agreement was executed?

A. We transferred what patents we had.

Q. Can you tell us what patents were transferred?
A. I don't know, I can't remember the names of them.
We had folding-edge patents, and it was in the agreement that we agreed to turn them over to the United States Gypsum Company.

Q. Will you look, sir, on page 13, under Exhibit B, and

tell me if those were the patents that were assigned?

Justice STEPHENS. What is Exhibit B?

Mr. KNUFF. Exhibit B is a portion of Exhibit No. 1.

The WITNESS. On page 13?

Mr. KNUFF. On page 13, sir—does it mention Exhibit B' there?

The WITNESS. Oh, yes.

Justice Jackson. It is not in the complaint, your Honor.

May I indicate to the witness what I have in mind?

Justice STEPHENS. Yes, you may.

Mr. KNUFF. May I strike the last question, please?

Justice STEPHENS. Yes.

By Mr. KNUFF.

Q. Does Exhibit B, attached to Government Exhibit No. 1, contain the list of the patents that were transferred at the time the license agreement was executed?

A. They must be the ones.

Q. Did you own or did your company own Armstrong

patent No. 1,278,821 at that time?

Mr. Bromley. I object to that question, not only on the ground that it relates to matter covered by the agreement, but on the ground that it is immaterial if it be directed toward showing that the transfer of these patents was in any way illegal, because as I understand the pleadings there is no charge in the complaint which could possibly cover any contention that it was wrongful because a patent pool or otherwise, to make as a part of this Beaver settlement in 1926 the transfer by Beaver to USG of certain patents which it owned. I think counsel should declare himself now as to whether he now contends that that is or is not one of the elements of illegality upon which he relies in his pleading, because as I read the pleading, it cannot possibly cover such a charge.

Justice STEPHENS. What is your contention, Mr. Knuff? Mr. KNUFF. We do not contend at this time that any of the patents mentioned in Exhibit B were void, if they were

patents that were owned by Beaver.

Justice STEPHENS. The Court does not understand. The Court understood Mr. Bromley to object to your inquiry into the ownership of these patents upon the ground that there is no charge in the complaint that the transfer of them by Beaver to USG was illegal.

Mr. KNUFF. We do not so contend.

Justice STEPHENS. Then what is the materiality of it? Mr. KNUFF. I want to find out the circumstances surrounding the execution of this license, what patents were transferred, at whose suggestion those patents were trans-

ferred, and what took place at that time.

Justice STEPHENS. Well, you are entitled to do that, but the objection to this question as to who owned them, in view of your statement that you do not charge that the transfer was illegal, seems to be well taken. The agreement speaks for itself as to what patents were transferred. The objection is sustained without prejudice to your right to inquire into the circumstances which led up to the execution of the agreement and the discussion concerning it so far as that is relevant under the pleadings.

#### By Mr. KNUFF.

Q. At whose suggestion, sir, were the patents mentioned in Exhibit B of Government Exhibit No. 1, transferred?

A. I can't remember that. I know that we felt that these patents were very valuable and that by turn1276 ing them over, by putting them in with the settlement, it would cut down the cash settlement that we had to make.

Q. Can you tell us at whose suggestion they were in-

cluded?

A. I know I was in favor of it.

Q. You were in favor of turning them over?

A. Yes, sir.

Q. And they were assigned?

A. Yes, sir.

Q. Now, Mr. Blagden, I call your attention, sir, to paragraph No. 3, on page 12, of Exhibit 185. Will you please

read it yourself?

Following the execution of your license agreement in July, 1926, did you endeavor to induce manufacturers of closed-edge board, other than Beaver, to accept a license from USG?

Mr. Bromley. I object to that as incompetent, as calling

for a conclusion.

Mr. KNUFF. If your Honor pleases, I framed my question in the identical words that paragraph 3 contains, and I am asking him if he did what he said he was going to do in that paragraph.

The WITNESS. There was no ---

Justice STEPHENS (interposing). Just a moment, do not answer before the Court has ruled. There is an objection

before the Court, Mr. Blagden.

1277 The fact that it is based upon the agreement would not necessarily mean that it is not a conclusion. However, the Court thinks that the objection is not well taken. We think it is proper to inquire whether or not the witness did attempt to induce others to accept licenses. The objection is overruled.

#### By Mr. KNUFF.

Q. You may answer the question, Mr. Blagden.

A. That question did not come up in the settlement of

our suit, as I remember it.

Q. I said—following the settlement of your suit did you attempt to induce others to enter the license agreement?

A. I did not go out and make a specialty of getting

others to come in, no, sir.

Q. Well; did you contact any other companies to have those companies take out a license agreement with USG?

A. Only when they asked me about the suit at any time.

Q. What companies did you contact, sir?

A. I did not contact them, they contacted me. Q. All right, what companies did you talk to?

A. I cannot remember which ones.

You testified before the Grand Jury in the District of Columbia, did you not?

A. Yes, sir.

Mr. KNUFF. For the purpose of refreshing the recollection of the witness I want to show him his Grand 1278 Jury testimony beginning on page 2205, and ask him to read it.

Mr. Bromley. And I object to this use of the Grand Jury

minutes as improper, incompetent and immaterial.

Justice Stephens. Don't read it for a moment, Mr.

Blagden, just lay it to one side.

Mr. Bromley. I do not understand that in a civil controversy Grand Jury minutes can ever be used for the purpose of refreshing the recollection of a witness. It seems to me that it is entirely improper.

Mr. KNUFF. I think your Honor indicated the other day that anything could be used, whether he wrote it himself, whether somebody else wrote it, or no matter who wrote it. It is offered for the purpose of refreshing his recollec-

tion.

Justice STEPHENS. Well, the Court was indicating that any document or object which refreshed recollection may. be used for that purpose, but that ruling was not so allinclusive as to forbid the objection that Grand Jury minutes are of a secret character. I will hear you on that.

Mr. KNUFF. We are not asking the witness to read aloud his testimony. This witness is asked to read what he testified to before the Grand Jury, for the purpose of refreshing his recollection. Of course we don't believe—in fact, if it was attempted here to have any person other than the witness read the Grand Jury testimony, we would strenu-ously object to it, but in view of the fact that the

1279 witness did testify before the Grand Jury, in view

of the fact that we have the Grand Jury testimony of the witness here now, we are simply asking this witness to use that testimony as a basis of refreshing his recollection.

Justice GARRETT. Is it for the purpose of refreshing

his recollection?

Mr. KNUFF. That is right, your Honor.

Justice GARRETT. Or for the purpose of trying to impeach what he is now saying?

Mr. KNUFF. Not at all, merely for the purpose of re-

freshing his recollection.

Justice STEPHENS. As presently advised, Mr. Knuff, the Court is of the view that the minutes of the Grand Jury proceedings ought not to be used in this manner; if they cannot be examined by anyone but the witness, obviously that would foreclose the Court from examining them or defendants' counsel from examining them and determining whether or not they do properly support a statement of refreshed recollection. However, if there is a large class of testimony of this sort involved, and if you expect to use the minutes of the Grand Jury in a number of instances, and feel that this ruling is of serious prejudice to the Government, the matter being somewhat novel, we will give you an opportunity to present authorities on it later, and

you may recall the witness.

Mr. Knuff. May I, at the present time, say this, your Honor? The same question that is now presented came up in the Madison Oil case, in United States versus The Socony Vacuum Company, and the way the matter was handled there was that the witness was allowed to read his Grand Jury testimony; then, in order to see whether or not there was anything in there that could refresh the recollection of the witness, the Court itself examined the Grand Jury minutes. The Court itself is always permitted to examine the Grand Jury minutes. Now that has been the uniform practice in the Antitrust Division for a great number of years, and I think the courts have uniformly adhered to that practice; that is, that the witness can examine the Grand Jury minutes, and the Court can examine them to see whether or not there is anything in there that could or might refresh the recollection of the witness.

That, I say, was specifically raised, that question, in the Madison case, and that is exactly the way the court handled it in that case. The court allowed the witness to examine the Grand Jury testimony and then the Court itself looked at the minutes of the Grand Jury testimony. We have no objection to that at all.

Mr. BROMLEY. The Madison Oil case was a criminal and

not a civil case.

Mr. KNUFF. All the more reason why it should be allowed in a civil case.

1281 Mr. Bromley. I think not, I think it is just the distinction. I don't think the Antitrust Division can either point to an authority nor to any practice in which they have ever attempted to do this in a civil case.

Justice STEPHENS. Was the criminal case tried in Madison, the criminal case which resulted from the indictment of the Grand Jury whose minutes were then being con-

sulted?

Mr. BROMLEY. It was, sir.

Mr. Knuff. That is right. Some courts have done this, your Honor, instead of having the witness refresh his recollection on the witness stand, they have allowed the witness to retire to a separate room and examine the Grand Jury minutes. In view of the fact that there are only three or four pages relating to that, I see no reason why we should ask this witness to take these Grand Jury minutes into another room and examine them. The defendants cannot be prejudiced because the Court can take a look at those Grand Jury minutes.

Justice STEPHENS. I should think defendants' counsel would have a right to look at them also, because any item of any character which is submitted to a witness in open court ought to be open to the adverse counsel. As presently advised, we think the examination is not proper and will sustain the objection, but we will give you an opportunity tomorrow morning if you wish to do so, to present authorities on the subject, or later if you wish to do

so, if that is too soon.

Mr. KNUFF. My understanding is, then, that Mr. Blagden cannot use the Grand Jury minutes to refresh his recollection.

Justice STEPHENS. That is the ruling of the Court at

the present time.

Mr. KNUFF. Very well.

Justice Stephens. But the Court makes that ruling subject to your right—the point is novel to the Court, and as the Court is advised all three members feel that ruling is correct—but you may have an opportunity tomorrow or later to recall the witness and to renew the offer to have him look at the minutes and present authorities to us.

Mr. KNUFF. Very well, your Honor.

What was my question, Mr. Reporter, before I asked the witness to look at the Grand Jury minutes?

(Whereupon, the reporter read the record as follows:

"Q. What companies did you contact, sir?

"A. I did not contact them, they contacted me. "Q. All right, what companies did you talk to?

"A. I cannot remember which ones.

#### By Mr. KNUFF.

Q. Well, did you talk to the Certain-teed Company?

A. I don't remember.

Q. Did you talk to the American Gypsum Company?

A. I can't remember whether I talked to them. I must have talked to some of them on this subject, but I can't remember who or which.

Q. Did you talk to the Ebsary Gypsum Company? A. I don't remember.

Q. Did you talk to the National Gypsum Company?

A. I don't remember.

Q. Did you talk to Niagara?

A. I don't remember.

Q. Did you talk to the Texas Company?

A. I don't remember.

Q. Did you talk to Universal?

A. I don't remember.

Q. Do you know George M. Brown?

A. Yes, sir.

Q. Did you ever talk to George M. Brown about this?

A. I have.
Q. What did you say to Mr. Brown?
A. He was

Mr. ADAMS (interposing). May we have it indicated when and where, with some reasonable degree of certainty?

Justice Stephens. Fix the time and place, approximate-

ly, if you can.

The WITNESS. I couldn't remember, it would be at some meeting.

## By Mr. KNUFF.

Q. Well, you entered the gypsum industry in 1923 -A. (Interposing.) It wouldn't have been until 1284 after our settlement.

Q. That makes it a whole lot easier. You settled the case on the 29th day of July, 1928, and you left the gypsum industry sometime in 1928.

A. It would be sometime between those dates.

Q. Now can you fix it a little bit more definitely than that, sir? Was it a matter of months or a matter of years or a matter of days—

A. (Interposing.) It was some time, I can't recall, it would come up at some meeting at which I would advise

him to take a license.

Q. Well, do you recall the meeting at which it came up?

A. No.

Q. Do you recall how it came up?

A. No. sir.

Q. Did you talk to George M. Brown on more than one occasion?

A. I can't remember that.

- Q. Are you sure you talked to him on one occasion?
  A. I must have, either he or his nephew, C. O. Brown.
- Q. You say it is either Mr. George M. Brown or his nephew C. O. Brown that you talked to?

A. Yes, I can't remember now —

Q. (Interposing.) I am not asking you to give us the conversation, I am asking if you talked to him.

1285 A. I must have talked to them, if we met at all, on this subject, because they were asking me, all the different ones of them —

Q. (Interposing.) By the "different ones of them",

what do you mean?

A. I mean the different companies.

Q. What companies asked you about it?

A. What did they ask me?

Q. You said different companies were asking you about it, and I say what companies were asking you about it?

A. I will have to explain. We had meetings out in Chicago, gypsum meetings, from time to time, and I attended one or two of those meetings, and the different ones would ask me naturally about this suit.

Q. Can you give us the date when you had those meet-

ings out in Chicago?

A. No I cannot.

Q. Was it after the license agreement was entered into?

A. Yes, sir.

Q. And it was before you left the gypsum industry?

A. Yes, sir.

Q. And who attended these meetings, sir?

A. Almost all the companies were represented.

Q. Let's get down to names. Was American represent-

A. They generally were.

1286 Q. Was Atlantic represented?

A. No, I doubt if Atlantic was there.

Q. What is that?

A. The Atlantic Gypsum Company hadn't taken out a license and didn't attend those meetings, as I remember.

Q. Do you know when the Atlantic Gypsum Company

took out a license, sir?

A. I do not.

Mr. KNUFF. Mr. Reporter, may I have the license agreement between USG and the Atlantic?

(The document was furnished Mr. Knuff.)

Mr. KNUFF. May it be stipulated by counsel for the defendants that the license agreement between Atlantic and USG was dated March 5, 1927?

Mr. BROMLEY. Yes, it is already in the record, Mr.

Knuff.

#### By Mr. KNUFF.

Q. Atlantic, sir, took out a license with USG on the 5th day of March, 1927. Now, keeping that in mind, was Atlantic at any of these meetings?

A. I don't remember, I don't think they were. Q. Was Certain-teed at any of these meetings? A. I doubt it.

Q. Well, who was Mr. Brown with? A. Certain-teed Products Company.

Q. Did you talk to Mr. Brown then at a place other than

the meetings?

Mr. ADAMS. I don't want to interrupt your witness, but he has testified to uncertainty as to whether he talked to C. O. Brown or George M. Brown. He said he talked to either one, and I would respectfully request that he indicate in his answer which one he talked to, and where, if he can.

Justice Stephens. Which Mr. Brown did you talk to,

if you remember?

The WITNESS. I saw a great deal more of C. O. Brown, he would attend the meetings. Mr. George Brown never attended any meetings.

#### By Mr. KNUFF.

Q. Now, did Certain-teed ever attend any of the meetings in Chicago?

A. Yes, they attended some of the meetings. Mr. Bromley. Could we have that date fixed, because of course Certain-teed took over the Beaver Company at a date. I think it is important to find out whether it was before that or after that.

Justice Stephens. Can you say about when that was?

The WITNESS. I can't remember.

#### By Mr. KNUFF.

Q. Was it before you left the gypsum industry?

A. I am not sure, but they must have been at some of these meetings, yes, sir.

1288 Q. When did you leave the gypsum industry, sir?

A. 1928. Q. Was it before that, the meetings that you attended?

A. I am not sure.

Q. Did you attend any after you left the gypsum industry? ·

A. No, sir.

Q. All the meetings you attended were before and while you were with Beaver?

A. Naturally.

Q. Now then, at any of those meetings that you attend-

Justice Stephens (interposing). When was Beaver acquired?

Mr. KNUFF. Beaver was acquired in April, 1928.

Mr. ADAMS. We can agree that we acquired physical possession on April 1, 1928. My recollection is that the contract was dated in January, 1928.

Justice STEPHENS. Well, we now have the date fixed At least these meetings apparently were. more definitely.

before that date. Proceed.

#### By Mr. KNUFF.

Q. Did you see Mr. Audenreid Whittemore at any of those meetings?

A. I don't remember meeting him at any of those meet-

ings.

Q. Did you ever talk to Mr. Audenreid Whittemore concerning a license agreement?

A. I don't remember.

Q. Did Mr. Ebsary ever attend any of the meetings that you have reference to?

Q. Did you talk to him at those meetings?

A. I must have talked to him at some of those meetings; I talked to all of these that attended the meetings.

Q. Did National attend any of the meetings?

A. Yes, sir.

Q. Did you talk to anybody from National there?

A. I can't remember now, sir.

Q. Are you certain that National attended any of those meetings? What is your best recollection?

A. I should think they would.

Q. Not what you "should think"; what is your best recollection?

A. I don't remember.

Q. Did Niagara attend any of the meetings?

A. I think so, but I can't remember.

Q. Did Texas, Mr. Gloyd, attend any of those meetings?

A. I think so.

Q. Did Universal?

A. I guess so.

Q. Not what you "guess".

A. I don't remember.

Q. What did you talk to Mr. Ebsary about at that meeting?

1290 Mr. Bromley. What meeting is this?

Mr. KNUFF. That he is referring to where he said he saw him.

Mr. Bromley. Could we have the time and the place?
The WITNESS. It would be at one of those Chicago meetings, I can't remember the time.

Justice STEPHENS. Was it before January, 1928, would

you say?

The WITNESS. Oh, yes.

Justice Stephens. Could you estimate —

The WITNESS (interposing). You see we had regular gypsum meetings and we would attend those meetings and we would talk about any subject that came up, and I can't

remember 'way back there what I talked about. .

Justice STEPHENS. I don't expect you to remember exact dates, and I don't expect you to remember anything that you don't remember, Mr. Blagden; but could you fix it within the year, do you think it would be within a year prior to 1928?

The WITNESS. Oh, I should think so, yes, sir.

Justice Stephens. Proceed.

By Mr. KNUFF.

Q. What did you talk about to Mr. Ebsary, or what did you say to Mr. Ebsary?

A. I don't remember.

Q. Well, would you again look at paragraph 3 on page 12 of Exhibit 185, and see if that will refresh your recollection?

A. That was written out by my attorney.

Q. I understand that.

A. It was written as a suggestion, and it had nothing

to do with what we finally settled in the suit.

Q. Then your answer to that is that paragraph 3, on page 12, does not refresh your recollection as to what you said to Mr. Ebsary, is that correct?

A. That is right.

- Q. Did you see Mr. Haggerty at any of those meetings?
- A. I don't remember, I don't think he attended them. Q. Did you see Mr. Williams at any of those meetings?

A. I don't remember.

Q. Did you see Mr. Baker at any of those meetings?

A. I can't remember.

Q. Did you see Mr. Gloyd at any of those meetings in Chicago?

A. I think I met him there.

Q. Did you talk to him out there?

A: I can't remember.

Q. Did you see Mr. Shearer at any of those meetings?

A. Yes, sir. Q. Did you talk to Mr. Shearer about the license agreements?

A. That always came up.

Q. And what did you say to Mr. Shearer to the 1292 best of your recollection?

Well, I can't remember.

Q. Well, what was the substance of the conversation?

A. Well, they would all ask me about the license. They may have asked advice about the license, and in almost every case I would advise them to take a license.

Q. Did you give any reasons to them why they should

take out a license?

Mr. ADAMS. I object to that unless it be fixed as to the person to whom he was talking, the time and the place, with some reasonable degree of certainty.

The WITNESS. I can't remember.

Justice Stephens (interposing). Just a moment, Mr. Blagden. Perhaps if your answer is that you do not remember, the Court need not rule. But the Court will rule, for the guidance of counsel. The Court is according to the Government all proper latitude with respect to these conversations because they are a long time in the past; yet, the Court must require some reasonable fixation of the time and place of a conversation. Otherwise, it is against the rule that the defendants have the right to have that time and place fixed in order to prepare to meet the evidence introduced. You don't have to fix it in a particular day or month, but it is too indefinite at the present time, I fear.

1293 Mr. KNUFF. The testimony of the witness is that this conversation took place sometime before 1928, and after the license agreement between his company and

USG was entered into.

The WITNESS. I can't remember talking to any one individual. I can remember advising somebody connected with some of those companies that were asking me about it. I would just recommend them to take a license. That is as far as my memory goes.

# 1294 By Mr. Knuff.

Q. But you can't, as your memory is at the present time, give us the names of a single individual—

A. (Interposing.) I couldn't pick out which individual it was, because it wasn't all of them. There may have been one or two. It probably was one or two, but as to which ones it was I could no more tell you than I could fly.

Q. Well, were the individuals that you talked to, sir, officials of the companies that were manufacturing gypsum

board?

A. Yes sir.

Q. And what did you say to those officials?

A. I advised them -

Mr. ADAMS (interposing). We object to that, Your Honor, unless the name of the persons is fixed so that we

can have some opportunity to meet the testimony.

Justice STEPHENS. We will hear you, Mr. Knuff, as to the propriety of continuing to ask this witness to tell what he said to these officials, in spite of the fact that he has said a half a dozen times that he doesn't remember. Now he has testified that he remembers in a general way advising them to take a license, if they asked him about the subject, but when counsel continually asks the witness to say something that he says he can't say, it just takes up unnecessary time, it seems to us.

Mr. KNUFF. I am not trying to take up any unnecessary time of the Court, but apparently the memory of this witness is exhausted as to particular persons. Now, then, he does say that all these persons that

he talked to were officials connected with the companies

that were manufacturing gypsum board.

. I think, in view of the fact that his memory has been exhausted, that he can now tell us what he said to officials of companies that were manufacturing gypsum board, con-

cerning the taking out of the license.

Mr. Adams. I press my objection, Your Honor, that we are entitled to have the person identified. At an earlier time in this case we made the same objection, because we can't meet this type of evidence unless we know who was on the other side of the conversation. There were hundreds of men in the gypsum industry and hundeds of officials.

Justice Stephens. The Court understands the witness to state, and to state on several occasions, that he cannot remember a particular conversation with any person or individual or official. He only remembers in a general way what he advised them when he was consulted about it or asked about it.

Now that being true, we think the last question asked

is not proper and the objection is sustained.

It is in the record already, as my colleague suggests, that when asked about the license he advised them to take a license. That is in the record.

Mr. KNUFF. And what I am trying to develop is

what he said to those people.

Justice Stephens. Very true, Mr. Knuff, and the Court understands why the Government, in proving its case, desires to prove what he said, and I appreciate that your efforts in that direction are proper. But the witness has said a half a dozen times that he doesn't remember. So why take any more time on the subject?

Mr. KNUFF. I will not take up any more time, Your Honor, on that subject. May I have Exhibit No. 157,

please?

### By Mr. KNUFF.

Q. Mr. Blagden, Exhibit 157 is a copy of a letter written by Mr. Griswold to Mr. J. H. McCrady, and I call your attention particularly to Paragraph 3 of that exhibit.

A. Yes, sir.

Q. You will notice, sir, that the last sentence of the third paragraph refers to a meeting with Certain-teed Products in New York. Did you attend that meeting?

A. I don't remember.

Q. Did you ever attend a meeting with Mr. Griswold, with Certain-teed Products?

A. I don't remember, I don't think so.

Q. You don't think so?

A. No.

Q. Did you ever contact Mr. Avery, in company with Mr. Palmer and Mr. Griswold, on behalf of U.S.G. granting to Certain-teed a license?

1297 A. No, sir, I don't think so; I don't remember of it.

Mr. KNUFF. May I have Exhibit No. 141, please. (Exhibit 141 was handed to the witness.)

By Mr. KNUFF.

Q. Mr. Blagden, Exhibit 141 is a copy of a letter written by Mr. Griswold to Mr. J. H. McCrady, and I call your attention particularly to the first paragraph of that letter.

A. That is dated April 12, 1928?

Q. That is right, sir. Have you read the letter, sir?

A. Yes, sir; I don't remember anything about that letter. Q. Do you remember whether or not you talked to

George W. Brown, as set forth in Exhibit 141? A. I can't remember any conversation with anybody with the American Gypsum Company and Mr. Brown.

Q. Mr. Brown was connected with Certain-teed?

A. Yes, sir.

Q. Did you talk with Mr. George M. Brown as is set forth in this letter, sir?

A. I can't remember that, no sir.

Justice STEPHENS. That should be George W. Brown. Mr. KNUFF. George W. Brown-I beg your pardon.

The WITNESS. I naturally advised Mr. Brown that I thought it was to his best interest to take a license.

#### By Mr. KNUFF.

1298 Q. When?

A. I can't remember that.

Q. The approximate date? A. I can't remember that, sir.

Q. Well, you are certain, sir, that you advised Mr. Brown that it was to his best interests to take a license?

A. When we were selling the company to him, it was

along about that time. That is as far as I can go.
Q. Would you say it was within two or three months of the date of his letters?

A. Somewhere along in there.

Q. Now what did you advise Mr. Brown, then, concerning that license?

A. I advised him to take a license with the U.S. Gyp-

sum Company.

Q. Did you explain to Mr. Brown the benefits of a license?

A. Yes, sir.

Mr. ADAMS. I object to the form of the question.

Mr. KNUFF. He can answer that yes or no.

Justice STEPHENS. I think that question can be answered yes or no. Do you object to that, Mr. Adams?

Mr. ADAMS. Yes, Your Honor.

Justice STEPHENS. Why?

Mr. ADAMS. I suggest that he be asked to give the substance of the conversation without counsel suggesting it.

Mr. KNUFF. I haven't suggested anything.

Justice STEPHENS. I don't think that is correct,

Mr. Adams; that objection is overruled. If you remember the substance of what you said to Mr. Brown you may tell us.

The WITNESS. I can remember the substance of what I told anybody that asked me about this, and it would be

the same with Mr. Brown.

By Mr. KNUFF.

Q. Well, what did you tell Mr. Brown, sir?

A. I told Mr. Brown that he couldn't afford to make a board without using the folded edge, that the cost was prohibitive.

Q. What else did you talk to him about?

A. And therefore advised him to take a license for his own best interests.

Q. Did you advise Mr. Brown that the folded-edge board was a superior product?

A. Yes, sir.

Q. Now did you give Mr. Brown any further advice as to the benefits of a license agreement?

A. I can't remember any.

Q. Did you talk to him about stabilizing prices under a license agreement?

A. I told him that, undoubtedly, if he were in with the others he would get the benefit of stabilization.

1300 Q. By "stabilization" what do you mean?

A. Stable prices.

Q. And by "stable prices" do you mean uniform prices?

A. He would get the benefit of the license price, which

would be the same price.

Q. State whether or not you told Mr. Brown that that would be a benefit to the industry?

A. I can't remember that.

Q. But you do recall that you talked first about a superior product, and second, that you talked to Mr. Brown about stabilizing prices, is that correct?

A. Yes, sir.
Q. Now do you recall anything else that you talked to Mr. Brown about?

A. I can't remember.

Q. You can't? A. No, sir.

Q. Now the same arguments that you used on Mr. Brown would you say that you told to the others in the industry? Mr. Bromley. I object to the characterization "argu-

ments" if the Court please.

Mr. KNUFF. The same reasons; may I correct the question?

Justice Stephens. You may correct it; the objection is sustained.

Mr. KNUFF. Did I understand that the objection would be sustained?

Justice STEPHENS. As you changed the question, 1301 it was correct.

Justice Jackson. Substituting "reasons" for "arguments," your question is proper.

Mr. KNUFF. The objection then is overruled?

Justice STEPHENS. The objection to the question as phrased was sustained, but you had changed the question so, I thought you understood you might proceed with the changed question.

Mr. KNUFF. Will you read the question, Mr. Reporter? (The reporter read the question as amended, as fol-

lows:

"Q. Now the same reasons that you used on Mr. Brown would you say that you told to the others in the industry?") The WITNESS. I can't remember.

#### By Mr. KNUFF. 1302

Q. Now I don't mean to quarrel with you, but if I understood your testimony correctly you said a moment ago that you told Mr. Brown the same thing that you told all the rest.

A. You must remember that we were selling the com-

pany to Mr. Brown.

Q. Do you recall any other person that you talked to?

A. No. sir.

Q. Mr. Gloyd?

A. I have answered that before, sir.

Q. All right, sir.

Mr. KNUFF. May I have Exhibit 103, please?

Justice Jackson. What exhibit are you asking for now?

Mr. KNUFF. Exhibit 103, Your Honor. \* May we suspend for a few minutes, please?

Justice Stephens. Yes, the Court will suspend for five minutes.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

Justice Stephens. Proceed, Mr. Knuff.

By Mr. KNUFF.

Q. Mr. Blagden, Exhibit 103 for Identification purports to be a letter written by Mr. Griswold to Mr. McCrady. I would ask you to read that letter, please.

A. Yes, sir.

Now in connection with that letter, I show you Government's Exhibit No. 186 and Government's Exhibit No. 187. Exhibit 186 purports to be a letter dated October 1, 1926, addressed to S. L. Avery and signed by A. S. Blagden. Government's Exhibit No. 187 is a copy of a letter enclosed with Government's Exhibit 186. purports to be a copy of a letter dated September 27, 1926, addressed to A. S. Blagden, President, and signed by Audenreid Whittemore.

Justice Stephens. The first of those is October 1, 1926,

and the other September 27, 1926?

Mr. KNUFF. That is correct, Your Honor.

Justice Stephens. 186 and 187?

, Mr. KNUFF. 186 and 187.

By Mr. KNUFF.

Q. Mr. Blagden, is that your signature on Exhibit 186? A. Yes, sir.

Q. And did you enclose that letter, dated September 27, from Mr. Whittemore, in your letter of October 1st to Mr. Avery?

A. That must be it.

Q. Now coming back, sir, to Exhibit 103, did you ever attend any meeting in May, 1926, where there was present a representative of every manufacturer of wallboard except those located on the Pacific Coast?

A. I can only remember attending a meeting out there, a gypsum meeting, and afterwards discussing wallboard.

Q. And when was that, sir?

A. I should think it would be about this time.

Q. What manufacturers were present at that gypsum meeting?

A. There must have been the regular members, the

manufacturers of wallboard.

Q. All the manufacturers of wallboard?

A. I can't remember.

Q. Can you remember any of them that were there?

A. I only in a general way remember that there was such a meeting, and that the wallboard representatives were there.

Q. And that you attended it?

A. Yes, sir, I think I attended it. I attended one meeting, I know.

Q. About May, 1926? A. I should say so.

Q. Did you ever attend a meeting where representatives of Certain-teed were first opposed to entering into any license plan?

A. I don't remember.

Q. Would you say that at that meeting of May, 1926, that that was the attitude assumed by Certain-teed? A. I couldn't remember that. 1305

Q. You can't remember that?

A. No, sir.

Q. Did you ever attend a meeting in 1926 where Mr. Avery was present?

A. I can't remember his being present at any of those

meetings, for sure.

Mr. KNUFF. As a part of the examination-in-chief of this witness, we offer in evidence, as an admission of USG, USG's answer to Interrogatory No. 23(a), if Your Honor pleases. 23(a) reads as follows:

"23. As presently advised, there were the following

meetings:

"(a) May 20, 1926; Chicago, Illinois. Sewell L. Avery, President of United States Gypsum Company, attended for a time a meeting of several representatives of other companies interested in the gypsum board business. The names of the representatives and their companies are not definitely known."

Justice Stephens. Any objection by any defendant?

(No response.)

Justice STEPHENS. It may be admitted,

Mr. JOHNSTON. That is admitted, I suppose, subject to the general objection?

Justice Stephens. This is an answer to an interroga-

1306 Mr. JOHNSTON. It is not our answer, though. It wouldn't be binding on Gloyd.

Justice STEPHENS. As to the defendants other than USG, you are correct, it is admitted subject to the usual reservation with respect to declarations.

Mr. KNUFF. It is only offered, if Your Honor please, as

an admission of USG.

Justice Stephens. I understand that.

By Mr. KNUFF.

Q. Mr. Blagden, referring to paragraph 3 of Exhibit. 103, did you ever attend any meeting of wallboard manufacturers where each representative was asked, in the presence of Mr. Avery, if he, the representative, was in favor of taking out a license agreement with USG?

Mr. Bromley. I object to that as leading and sugges-

tive.

Mr. KNUFF. Read the question, Mr. Reporter, please. He

can answer that yes or no, Your Honor.

Justice Stephens. Well, not every question that can be answered yes or no escapes the objection that it is leading. It may suggest the answer, and to that extent it is objection-Read the question. able.

(The pending question was read by the reporter.)

Justice STEPHENS. The Court thinks it is leading. the answer were yes, it would be the words of counsel, not of the witness. But you may inquire whether or not, after directing his attention to that paragraph, he has any recollection of any discussion on

the topic there referred to, and ask him to tell about it.

The objection is sustained in its present form.

### By Mr. KNUFF.

Q. Will you read paragraph No. 3 of Mr. Griswold's letter, and state whether you have any recollection as to representatives being asked, in the presence of Mr. Avery, if they were in favor of taking out a license agreement?

A. I don't remember that.

Q. You don't, sir?

A. No, sir.

Q. State whether or not, sir, you attended any meetings of wallboard manufacturers about the time of the date of this letter, where Mr. Avery stated that a licensing arrangement seemed to be the best course for the industry as a whole to pursue?

Mr. Bromley. The same objection.

Justice STEPHENS. Objection sustained. Ask the witness to read the exhibit carefully, and then ask him if he was present at such a meeting as is referred to in the paragraph, and tell what he remembers about it, so we will have his independent recollection, if he has one.

# By Mr. KNUFF.

Q. Do you have any independent recollection, sir, of the contents of paragraph No. 4 of Exhibit 103?

A. I remember attending a meeting out there where wallboard was discussed. I can remember no details whatsoever.

Q. You can't remember whether Mr. Avery was there

or not?

A. No. sir.

Q. And of course, if you can't remember whether Mr. Avery was there, you can't remember whether he said anything, is that correct?

A. That is right.

Q. Do you recall whether or not those present were to write you a letter concerning what was to be included in a license agreement?

A. I do not. Q. Will you now, sir, refer to Exhibit 187, where Mr. Whittemore said, "which letter you have given", and so forth. It is the letter of September 27, 1926.

A. Yes, sir.

Q. Which letter you gave to Mr. Avery-does that refresh your recollection?

A. What is the question?

Mr. KNUFF. Read the question, Mr. Reporter.

(The question was read by the reporter as follows:

"Do you recall whether or not those present were to write you a letter concerning what was to be in-1309 chided in a license agreement?")

## By Mr. KNUFF.

Q. Now I have asked you to refer to the letter of September 27, 1926. Does that refresh your recollection?

A. No, sir.

Q. It doesn't.

A. No.

Q. Do you know whether you received a letter from Mr Whittemore as he refers to in his letter to you of September 27?

A. I can't remember that.

Q. I show you, sir, what has been marked for Identification as Government's Exhibit No. 188, which purports to be a letter, dated September 24, 1926, and addressed to you.

A. Yes, sir.

Q. Did you receive that letter, sir?

A. Yes, sir.

Q. From whom did you receive it?

A. That is from Mr. Avery.

Mr. KNUFF. I now offer in evidence, if Your Honor please, Government's Exhibits 186, 187-and 188.

Justice Stephens. Is there any objection except the usual objection?

Mr. Bromley. No, sir.

1310 Justice Stephens. They are admitted. They are offered, I assume, under the general theory of declarations of an alleged co-conspirator?

Mr. KNUFF. That is correct, Your Honor.

Justice STEPHENS. They are admitted subject to the usual reservation that so far as they apply to other alleged co-conspirators than the one from whom they come, they must be connected by a prima facie establishment of a conspiracy.

(The documents referred to, marked as Government's Exhibits Nos. 186, 187 and 188, were received in evidence.)

#### By Mr. KNUFF.

Q. I show you, sir, what has been marked for Identification as Government's Exhibit 189, which purports to be a letter dated October 1, 1926, addressed to Mr. S. L. Avery, and signed by A. S. Blagden; and I will ask you if that is your signature to the letter, sir?

A. Yes, sir.

Q. In the second paragraph of that letter, you state: "I feel that the entente cordiale that has been started between our companies is only the beginning, and that if we play the game right it should bring about big things." Do you see that, sir?

A. Yes, sir.

Q. What did you mean by that?

A. Well, that all our bickering and squabbling and fighting was over, and that from there on everything ought to be all right.

Q. What did you mean by "entente cordiale"? The friendship between the two companies.

Q. Were the companies friendly before that, or not?

A. No, sir.

Q. They weren't friendly?

A. We hadn't been.

Q. And what did you mean by "playing the game right"?

A. Living up to the agreement.

Q. That is, obeying the published prices of USG?

A. Yes, sir.

Q. Now, at that time, how many companies had taken out a license with USG?

A. I don't remember; I was only referring to our own

arrangement.

Mr. KNUFF. I offer in evidence, if Your Honor pleases,

Government's Exhibit No. 189.

Justice Stephens. If there is no other objection, it will be received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's

Exhibit No. 189, was received in evidence.)

By Mr. KNUFF.

Q. I now show you, sir, what has been marked for Identification as Government's Exhibit 190, which is a letter dated October 19, 1926, addressed to Mr. S. L. Avery, and signed by A. S. Blagden. I will ask you if that is your signature, sir?

A. Yes, sir.

Mr. KNUFF. I offer in evidence -

The WITNESS (interposing). Wait a minute, I haven't read it yet.

Yes, sir.

Mr. KNUFF. I offer in evidence, if Your Honor pleases, Government's Exhibit 190.

Justice Stephens. Received, subject to the usual reser-

vation with respect to this type of evidence.

(The letter referred to, marked as Government's Exhibit 190, was received in evidence.)

By Mr. KNUFF.

Q. Mr. Blagden, please refer to paragraph No. 2 of that

Will you tell the Court just what was meant by, "I would rather make no change until we can get together and thresh out the point you brought up in regard to

jobbers and the several other questions that should

1313 be settled at once."

A. I can't remember the detail. The price we made was to dealers, and all the prices we quoted and the prices that were established by the arrangement were for dealers; and where the jobbers came in, that brought up another question.

Q. What was that question that was brought up?

A. Well, there would be a difference in price there, and that hadn't been threshed out.

Q. Who brought that up?

A. I guess somebody in our company did.

Q. Well, what does your letter say, sir?

A. That there was some correspondence between the two companies, and rather than try and settle it by letter we would wait until we could sit down and thresh it out.

Q. Now who brought that point up about the jobbers?

A. I can't remember that.

Q. Well, fook at your letter, sir,

A. Somebody in the United States Gypsum Company, I take it.

Q. The letter was addressed to Mr. Avery, and it states, "the point you brought up in regard to jobbers".

A. Yes, sir, Mr. Avery would bring it up.

Q. And what point was it that Mr. Avery brought up? A. I don't remember, I don't remember the details.

It had something to do with the price to jobbers.

1314 Q. Did it concern the elimination of jobbers? A. I can't remember that. I think there was a discussion on between us about jobbers.

Q. Well, what was that discussion, your best recollec-

tion?

A. That there was a difference of price that existed, and that in some way it had to be worked out and threshed out to the best interests of all concerned.

Q. Well, were you going to make the price to the jobber

the same as -

A. (Interposing.) No. Q. (Continuing.) The same as to the dealer?

A. We would have to live up to the understanding of the agreement. Now what the detail of that was, I can't remember.

Q. All that you know is that there was a discussion concerning jobbers?

A. Yes, sir.

Q. I show you, sir, what has been marked for Identification as Government's Exhibit 191, which is a copy of a letter dated October 19, 1926, addressed to A. S. Blagden, President, and I will ask you if you received that letter. and from whom you received it?

A. Yes, sir.

1315 Q. From whom did you receive it?

A. This is from Mr. Avery.

Mr. KNUFF. I now offer in evidence Government's Exhibit No. 191.

Justice Stephens. It may be received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The letter referred to, marked as Government's Ex-

hibit 191, was received in evidence.)

# By Mr. KNUFF.

Q. I show you, sir, what have been marked for Identification as Government's Exhibits 192, 193 and 194. Exhibit 192 is a copy of a letter dated September 15, 1927, addressed to Beaver Products Company, and is unsigned, the copy is unsigned.

Exhibit 193 is a letter dated September 16, 1927, addressed to Mr. S. L. Avery, President, and is signed A. S.

Blagden.

Exhibit 194 is a letter dated September 21, 1927, addressed to Mr. S. L. Avery, and is also signed A. S. Blagden.

Will you look at these exhibits, sir, and tell me if you received the first exhibit, and if you signed the other two

exhibits?

1316 A. Yes, sir.

Q. Please look at the last paragraph of Exhibit No. 194, where Mr. Fuller's name is mentioned. Did you write a letter to Mr. Fuller that contained some plan, and if so what was the plan that it contained?

A. I don't remember of ever writing him what this would refer to. I think it was just a note from him, from

reading this.

Justice Jackson. From whom? The WITNESS. From Mr. Fuller.

## By Mr. KNUFF.

Q. I beg your pardon, I misinterpreted it. In Mr.

Fuller's letter to you, did he tate what the plan was that Mr. Avery had written about?

A. I don't remember.

Q. You don't remember that, sir?

A. No, sir.

Q. Now the letters of September 21, September 16, and September 15, all refer to a meeting of board licensees, do they not?

A. Yes, I take it so.

Q. What is meant by "board licensees", what do you mean by a "meeting of board licensees"?

A. I wouldn't say board licensees; I would say those interested in the manufacture of board. I don't know whether they were licensees or not.

Q. Look at Mr. Avery's letter of September 15, 1317

That is right, it would be licensees. Q. Did the licensees hold meetings?

A. Yes, sir. Q. And who were licensees at that time, sir?

A. I can't remember.

Q. It is in evidence, sir, that your contract or your license agreement with USG is dated the 29th of July, 1926; that the Universal agreement with the USG is dated the 17th of September, 1926; that Atlantic's agreement with USG is dated the 5th day of March, 1927; and that the Texas agreement with USG is dated the 18th of April, 1927. And this letter is dated September 15, 1927. Now did those companies, that is, yourself, Universal, Atlantic, and Texas, hold meetings with USG?

Q. What was the purpose of those meetings, sir?

A. Just to discuss the license arrangement in its detail and iron out any difficulties that there might be.

Q. What was discussed at those meetings?

A. I can't remember the details. To see that everybody was lined up and was playing the game according to arrangements.

Q. What do you mean by the expression, "to see that

everybody was lined up"?

A. I mean to see that those that became licensees 1318 understood fully the agreement and were living up to it.

Q. And by "lined up", you mean that the meetings were held to see that the licensees lived up to the terms of the agreement, is that correct?

A. That is correct.

Q. Were you interested in manufacturing a different type board than that specified in the license agreement?

A. Were we? Q. Yes. A. No. sir.

Q. At any of these license meetings, was the question of prices discussed?

A. I can't remember what we talked about. The price

was always set by the USG Company.

Q. At any of these meetings, did you ever complain to the USG concerning the price that was set?

A. I can't remember that we did.

Q. Would you say that it was or it wasn't discussed? A. I don't remember.

Mr. KNUFF. I offer in evidence, if Your Honors please,

Exhibits 192, 193 and 194.

Justice STEPHENS. They may be received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The letters referred to, marked as Government's Exhibits 192, 193 and 194, were received in evidence.)

## By Mr. KNUFF.

Q. I show you, sir, what has been marked for Identification as Government's Exhibits Nos. 195 and 196. Government's Exhibit 195 is a copy of a telegram dated February 27, 1928, addressed to Mr. S. L. Avery and signed A. S. Blagden. Government's Exhibit 196 is a copy of a telegram, undated, addressed to A. S. Blagden and signed by S L. Avery.

Did you send Exhibit 195, and did you receive the

answer set forth in Exhibit 196?

A. Yes, sir.

Q. You sent the telegram designated as 195, is that correct?

A. Yes, sir.

Q. Who is Mr. C. O. Brown?

A. He is Mr. George Brown's nephew.

Q. And with what company was he connected, sir?

A. Certain-teed Products.

Q. In what capacity? A. In charge of sales.

Q. In charge of sales?

A. Yes, sir, as I remember.

Q. I notice that in the reply of Mr. Avery, that you had committed some breach of etiquette in the gypsum industry. Were you conscious of that when you sent Exhibit 195?

A. I don't think I thought anything about it.

Q. What did you go out to Chicago for on the 27th of February, 1928?

A. Did we go? I don't remember.

Q. Did you go?

A. I don't remember that. Mr. Avery said he wouldn't see us, that someone else would see us, and I don't remember having gone.

Q. Did Mr. Avery say that he wouldn't see you?

A. Yes, sir.

Q. How is that?

A. The telegram so states, that he would not see Mr.

C. O. Brown.

Q. Did he say in that telegram that he wouldn't see you?

A. No, sir.

Q. Do you recall whether you went out there?

A. I can't remember whether I went at that time or not.

Q. What business did you and C. O. Brown have with Mr. Avery on or about that time?

A. Discussing the license arrangements.

Q. What license arrangement?

1321 A. Of the Certain-teed taking a license, as I remember.

Q. At that time was Certain-teed a licensee?

A. I don't think so.

Q. Now then, did you ever discuss with C. O. Brown the question of whether or not Certain-teed should take a license from USG?

A. I had advised them all along to take a license.

Q. I understood you to say that you had advised George Brown.

A. Well, I had advised O. C., likewise. Q. You had? And what did you tell C. O. Brown?

A. I can't remember.

Justice STEPHENS. It is O. C. Brown, is it not? The record is being confused."

Mr. KNUFF. Claude O. Brown is the correct name. Justice STEPHENS. It got turned around in the telegram. It is C. O. in one telegram and O. C. in the other. Which is correct?

The WITNESS. C. O. Brown is correct. Mr. KNUFF. C. O. is correct.

Mr. ADAMS. Claude O. Brown.

Mr. KNUFF. What is my question?

(The question was read by the reporter.)

By Mr. KNUFF.

Q. Did you advise Mr. C. O. Brown that a licensing agreement would be beneficial for his company?

A. I can only remember advising the Certainteed Products Company that it would be to their best interests to take a license. Now just who the individuals were, I can't remember. It was mostly with

Mr. George Brown.

Mr. KNUFF. If Your Honor pleases, I had quite a lot of other direct-examination of this witness, but in view of Your Honor's ruling as to my right to show the witness the Grand Jury testimony, I have gone at this time just as far as I care to go. I would be glad to prepare a memorandum or to bring in tomorrow morning authorities in support of my position. I don't like to turn this witness over for cross-examination until I have had an opportunity to present the Grand Jury matter thoroughly to the Court,

Justice Stephens. This witness is engaged in war work, I think you ought to be through with him as is he not?

soon as possible.

Mr. KNUFF. I will.

Justice GARRETT. That next let, r, have you introduced that?

Mr. KNUFF. Thank you, Your Honor; I don't believe I have as yet offered in evidence Exhibits 195 and 196. not offering the telegram dated February 20, 1928.

Justice Stephens. Well, Exhibits 195 and 196 may be received in evidence subject to the usual reservation with

respect to declarations of co-conspirators.

The documents referred to, marked as Government's Exhibits 195 and 196, were received in evidence.)

Justice STEPHENS. Mr. Knuff, the Court Reporter called the attention of the Court t the fact that it apparently would be a useless expense, in printing the Government's brief in the record, to print the index and statement of Unless you have some objection, the Court will direct just the substance of the brief to be printed, that is, the body of the brief as distinguished from the index.

Mr. KNUFF. No, I haven't any objection to that. It will

be perfectly all right.

Justice Stephens. The index and table of cases may be left out, but the body of the brief as a whole may be put in.

There will be a recess until tomorrow morning at 10

o'clock.

Before you announce the recess, will you gentlemen also be armed with cases with respect to your position?

Mr. BROMLEY. We will, Your Honor.

Justice Stephens. You may now announce the recess. (Thereupon, at 3:48 o'clock p.m., a recess was taken until 10:00 o'clock a.m., Tuesday, November 30, 1943.

1324 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

V

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of Texas Cement Plaster Company; Sewell L. Avery; Oliver M. Knode; Melvin H. Baker; Bror H. Dahlberg; Henry J. Hartley; Frederick G. Ebsary; and Frederick Tomkins, Defendants.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

WASHINGTON, D. C., TUESDAY, NOVEMBER 30, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)
Mr. KNUFF. May it please the Court, Mr. Brom-

ley has called to my attention the correction that I had made on page 1614, line 2, where I suggested that the change should be made from September 15 to September 16. The reporter had it correct, September 15, and I ask that

my proposed change be disregarded.

Justice STEPHENS. That may be done.

Are there any authorities to be presented with respect to the right to use the Grand Jury's minutes to refresh recollection, Mr. Knuff?

Mr. KNUFF. Yes, I have some very pertinent authorities,

Your Honor.

With Your Honor's permission, shortly after the recess yesterday, and while Mr. Blagden was on the witness stand; I asked Mr. Blagden what companies he contacted, and his answer was, "I didn't contact any", and that "They contacted me."

I said, "Well, what companies did you talk to, then?",

and his answer to that was, "I can't remember."

Then I offered to show Mr. Blagden his Grand Jury testimony beginning on page 2205, for the purpose of refreshing his recollection. That was objected to on the ground that the use of the Grand Jury

minutes is improper, incompetent and immaterial.

I cited the Madison Oil case, and I cited another situa-Mr. Bromley's reply to that was that while that may be true in a criminal case, nevertheless this is a civil case and hence the Madison Oil case is no authority for the use of Grand Jury minutes to refresh a witness' recollection.

I submit that there are not different rules of evidence for criminal cases and civil cases. The rules of admissibility, the rules relating to refreshing the memory of witnesses, are the same both in civil and in criminal cases, and if it can be used in a criminal case, by the same token it. likewise can be used to refresh a witness' recollection in a civil case.

Now the leading case, probably, on the question of refreshing the witness' recollection is Hickory v. United States, 151 U.S. at 303, where the Court said, at page 309:

'When a party is taken by surprise by the evidence of his witness, the latter may be interrogated as to inconsistent statements previously made by him for the purpose of refreshing his recollection and inducing him to correct his testimony; and the party so surprised may also show the facts to be otherwise than as stated, although this inci-

dentally tends to discredit the witness.

That is the general rule.

Justice Stephens. What is that citation?

Mr. KNUFF. The citation, sir, is 151 U.S. 303, at page 309.

The Courts have been rather liberal in allowing refresh-

ment data to be used by the witness for the purpose of arriving at the truth. The Courts have looked and have said that, "After all, what we are seeking is the truth",

and they have been rather liberal.

In this connection—and this is very much in point—is the case of Jelke v. United States, 255 Fed. at 264, (C.C.A 7, 1918). The trial court there directed the attorneys for the Government to take certain witnesses into the adjoining room and to read the testimony of such witnesses given before the Grand Jury, and then recall them and renew certain questions that had previously been answered evasively. The Circuit Court of Appeals approved this procedure, saying, at page 289:

"Is this error? We think not. When a witness upon the trial of any case, whether criminal or civil, convinces the court that he is 'conveniently forgetful,' the trial judge is amply justified in taking matters into his own hands, and on his motion taking such steps as will lead to the

ascertainment of the truth.

be so conducted as to insure the acquittal of the innocent, but it must not be forgotten that they are also conducted for the purpose of convicting the guilty, and in all cases the court should endeavor to get the real facts—the truth. When the judge is convinced that a witness is conveniently hiding behind the answer, 'I can't recall,' or 'I don't remember,' which is tantamount to perjury, he fails in his duty if he does not take such necessary steps as will reawaken the witness' conscience and his memory."

Following that case the Supreme Court, in the Madison

Oil case -

Justice Stephens (interposing). That is the Socony Vacuum case?

Mr. KNUFF. Yes. The Supreme Court cited with approval the case of Di Carlo v. United States, 6 Fed (2d) 364 C.C.A. 2, 1925), and what the court said there was this—I am not quoting from the Supreme Court, I am quoting from 6 Fed. (2d) 364:

"The latitude to be allowed in the examination of a witness, who has been called and proves recalcitrant, is wholly within the discretion of the trial judge. Nothing is more unfair than to confine a party under such circumstances to neutral questions. Not only may the questions thus extend to cross-examination, but, if necessary to bring out the truth, it is entirely proper to inquire of such

1330 a witness whether he has not made contradictory statements at other times. He is present before the jury, and they may gather the truth from his whole conduct and bearing, even if it be in respect of contradictory answers he may have made at other times."

"The possibility that the jury may accept as the truth the earlier statements in preference to those made upon the stand is indeed real, but we find no difficulty in it. If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court."

Now I say the Supreme Court cited that case and fol-

lowed it in the Madison Oil case —

Justice STEPHENS (interposing). Have you read Metzler v. United States, 64 Fed. (2d) 203, also cited in the Socony-Vacuum case?

Mr. KNUFF. I don't recall that I did, sir.

Now in the Socony-Vacuum case, the court had this further observation to make, in *United States* v. Socony-Vacuum Oil Company, 301 U.S. at 150, at page 233. Justice

Douglas said this:

"As in the case of leading questions, St. Clair v. United States, 154 U.S. 134, 150, such use of grand jury testimony for the purpose of refreshing the recollection og a witness rests in the sound discretion of the trial judge. See Di Carlo v. United States, 6 F. 2d 364, 367-368; Bosselman v. United States, 239 F. 82, 85; Felder v. United States, 9 F. 2d 872. He sees the witness, can appraise his hostility, recalcitrance, and evasiveness or his need for some refreshing material, and can determine whether or not under all the circumstances the use of grand jury minutes is necessary or appropriate for refreshing his recollection. As once stated by Judge Hough, "The bald fact that the memory refreshing words are found in the records of a grand jury is not a valid objection."

So I submit that we should be allowed in these proceedings to refresh the witness' recollection either by letting him read his grand jury testimony and then affording counsel for the defendants an opportunity to see that grand jury testimony, or we can do what was done in the Madison

Oil case, that is, I can read the minutes to the witness and then see whether or not they refresh his recollection. And if I am allowed, I propose to adopt the latter course. Thank you.

Justice Stephens. Mr. Bromley.

Mr. Bromley. I should like at the outset to challenge counsel's statement that this witness has been recalcitrant or evasive. I mention it not only in what I deem to be fairness to the witness, but also because it seems to me that that indicates that counsel really is not attempting to refresh recollection at all but is attempting to do what we all agree should not be permitted to be done, and that is to impeach his own witness.

However, I shall argue the question on the basis on which he first posed it, and that is whether or not it is proper to use Grand Jury minutes in a civil proceeding

for the purpose of refreshing recollection.

All will agree, I am sure, that the public policy is that grand jury minutes should be kept secret, their contents should not be divulged, and that that is a very high public policy and should not be violated or deviated from unless, as the Metzler case held, the ends of justice require it. And it is true that after the grand jury's functions are ended, disclosure sometimes may be proper where the ends of justice require it.

We have found at least three cases in New York which set very definite limitations on what disclosure should be permitted even after the grand jury proceedings have terminated and everything in relation to them is closed. For instance, our Court of Appeals in New York has

held that the plaintiff in an action for malicious prosecution is not entitled to an order directing the District Attorney to furnish the plaintiff the grand jury minutes of a grand jury which had indicted the plaintiff for extortion.

Now that is one limitation on the use of grand jury min-

utes.

Justice Jackson. That was on a motion to inspect the

minutes, I suppose, prior to the trial?

Mr. Bromley. Well, it was in a civil suit, if Your-Honor pleases. The plaintiff was suing the defendant for malicious prosecution, and of course it was material to his cause of action to see what the grand jury had done about the prosecution, where the grand jury had indicted the plaintiff for extortion. And while it was akin to a motion for inspection, it was a little different because the plaintiff

in a civil suit wanted to get access to the grand jury minutes, and the court said, "You can't do that."

Justice Jackson. I misunderstood you.

Mr. Bromley, That is 12 N.Y. Supp. (2d), 207, of 256 App. Div. 772.

Justice Stephens. What is the name of the case?

Mr. Bromley. Dworetzky v. Monticello Fish Company.
Justice Jackson. That didn't go to the Court of Appeals,
did it?

Mr. Bromley. It did not, sir.

1334 Now likewise, in the investigation which occurred in New York City of the acts of Magistrate Ewald, application was made for inspection of testimony taken before a grand jury. There the use sought to be made was in connection with a non-criminal investigation of the conduct of a clerk of a city court, a removal proceeding against the clerk of a city court, and application was made for inspection of the testimony taken before a grand jury in connection with the prosecution of Magistrate Ewald. Again that application was denied.

And finally, a motion in a civil action for inspection of a deceased person's testimony in grand jury minutes was denied, the ground being that the court had no jurisdiction to place the minutes of a grand jury at the dis-

posal of a litigant in a civil action.

I think it is significant that counsel for the Government has not referred us to any case in which this precise question has been decided. I have not been able to find any,—I hope the Court has not,—because it seems to me very unusual, and to be significant, that it has never arisen.

This action in which we are concerned is, after all, a mere civil action. It seems to me to be violative of the well-established public policy for this Court to place the minutes at the disposal of the plaintiff here, even though the plaintiff be the Government.

Now there is a second ground -

Justice Stephens (interposing). What is that second case you cited?

Mr. BROMLEY. The second case is People v. Ewald, 259 N.Y. Supp. 314, again not to the Court of Appeals.

Justice Jackson. It didn't go to the Appellate Division

either, did it?

Mr. BROMLEY. That one I can't tell from this citation,

and I have forgotten.

Justice Jackson. I thought from your citation it did not. That is the reason I asked you.

Mr. Bromley. Now there is a second ground of opposition which is referred to in the Socony-Vacuum case. It seems to me that the law as laid down by the Supreme Court still is that unless a prior statement was made contemporaneously with the happening of the event to which it relates, it may not be used for the purpose of refreshing the recollection of a witness, and that this is true of grand jury minutes. The Socony-Vacuum case cites Putnam v. United States, 162 U.S., a decision by the Supreme Court in 1896, involving the use of grand jury minutes. The Supreme Court held that unless the testimony before the grand jury is nearly contemporaneous, there is no reasonable probability that the memory of the witness as impaired at the time of the trial was not equally so when his testimony on the prior occasion was committed to writing.

den, leaving the industry entirely in 1928, now being asked questions about what happened as far back as 1925, 1926, 1927 and 1928. Twelve years after he left the industry he appeared before the grand jury, that is, in 1940, and gave some testimony. Are not the observations of the Supreme Court in the Putnam case peculiarly appropriate to his situation? Is there any reason to think that his memory as it exists today, impaired as it is by the lapse of time, was not equally so when his testimony

was given in 1940?

Now this precise question was raised in the Socony-Vacuum case. We have looked at the Government's brief in that appeal to the Supreme Court. They devoted 12 pages to an argument to try to induce the Supreme Court to overrule the Putnam case, saying that it was outdated and should be overruled. The Supreme Court, however, in Justice Douglas' opinion, did no such thing. It pointed out that in the Madison Oil case the witness whose recollection was refreshed was a man who had festified before the Grand Jury to events which had occurred only a year before his testimony was given before the grand jury, but that the charge was that he was a member of a conspiracy which had continued right up to the very time of the grand jury, and therefore, while the things that he testified to before the grand jury were a year old, nevertheless he was an active participant in the course of action which

1337 must have kept those events and all of them fresh in his mind. So the Court said that in the Socony-Vacuum case, the fact that a year has elapsed is not a rea-

son for applying the doctrine of Putnam v. United States. In Putnam v. United States, there was only 4 months' elapsed time between the event which was testified to and

the grand jury proceedings.

Here we have a man who had no connection with any alleged conspiracy after 1928 because he got out of the industry, who was out and away from these events for at least 12 years, and it is now sought to say that his testimony given in 1940 should be used to refresh his recollection, in face of the fact that the Supreme Court has decided—and Mr. Wigmore acknowledges—that it is still the majority rule in this country that a prior statement can not be used, even testimony or deposition or grand jury minutes, can not be used unless the event testified to was reasonably contemporaneous with the grand jury testimony.

Now Mr. Wigmore, it is true, criticizes that, but he discusses the *Putnam* case and he discusses other cases, and he makes the definite statement that that is still the ma-

jority rule.

So it seems to me on that ground, in view of the extreme circumstances presented here, that is, the great length of time between the events to which he was testifying and

the date of his testimony, that the rule of the

1338 Putnam case should be applied.

Mr. KNUFF. May I say a few words in reply, Your Honor?

Justice STEPHENS. Yes.

Mr. Knuff. The three cases cited by Mr. Bromley I have no quarrel with. Those cases weren't decided on the question that one action was a civil case and the other action was a criminal case. They were decided on the well-recognized ground that private individuals have no right to

inspect grand jury minutes.

In the Madison Oil case they tried to do the same thing, and it wasn't allowed there. In numerous cases defendants in Sherman Act cases have endeavored to have access to the grand jury minutes, and the courts have uniformly held that a defendant or no person else is entitled to have access to those grand jury minutes. That was the rule, that was the reason for the decision in those cases, not that the one case was criminal and the other case was civil.

Now in so far as Putnam v. United States is con-

cerned —

Justice STEPHENS (interposing). Do you contend that the Government has a higher right of access to the grand jury

minutes than defendants and private persons?

Mr. KNUFF. Not at all, but here we have a situation where the Grand Jury was investigating the gypsum industry. This isn't a case where we go out to someplace in

the Middle West in an investigation not connected 1339 with the very matter on trial. This very matter that is now being tried was under investigation before that grand jury. This witness appeared before that grand jury and gave testimony concerning matters that

are now on trial.

The Putnam case—I am very familiar with the Putnam case. It has been severely criticized not only by Mr. Wigmore, but it has likewise been criticized by Mr. Greenleaf, and I would like to refer, with Your Honor's permission—

Justice STEPHENS (interposing). Did the Supreme Court

sustain it as Mr. Bromley states?

Mr. KNUFF. They damned it by faint praise, Justice STEPHENS. Did they apply its rule?

Mr. KNUFF. There was no occasion to apply that. Here is what the Supreme Court said about it, Your Honor. I

am reading from page 236:

"Putnam v. United States, supra, held it was prejudicial error to use grand jury minutes to refresh the memory of a witness unless that testimony was contemporaneous with the occurrences as to which the witness was testifying. There the testimony before the grand jury was more than four months after the occurrence. This Court held that because of the lapse of time the testimony was not contemporaneous. Whatever may be said of the Putnam case on the merits (see Wigmore, supra, Sec. 761) it does not

establish an inflexible four months' period of limita-1340 tion. There the event was a single isolated conver-

sation, not damaging to the defendant."

Mr. Bromley (interposing). " most damaging to the defendant."

Mr. KNUFF. "\* most damaging to the defendant. Here there was a continuing conspiracy extending at least up to the period when the witnesses were testifying before the grand jury. Much of the testimony related to events a year or more old. But in the main those matters were woven into the conspiracy, related to events in which the witness actively participated, concerned the regular business matters which which he was familiar, pertained to his regular employment, or constituted admissions against interest. On these facts we do not think there was an abuse

of discretion on the part of the trial judge in permitting

the testimony to be used,"

Here what we have is a continuing conspiracy, starting back in 1925 and existing up at least until the time of the filing of the bill. The witness is testifying to matters that occurred during the continuance of that conspiracy, although he was before the grand jury some years after the conspiracy had originally taken shape,

The courts that have considered the Putnam case, a number of the State courts, have not followed it, and have re-

fused to follow it.

Wigmore criticizes it in Volume 2, Section 761, on page

42, second edition, 1923.

Greenleaf criticized it in Volume 1, page 540, at

page 544.

The State courts that had ignored or expressly declined to follow it are Mahoney's Administrator v. Rutland R. R. Co., 81 Vt. at 210; Folsom v. Apple River Log-Driving Company, 41 Wis. 602; Davis v. Field, 56 Vt. 426; Bank of Charleston National Banking Association v. Zorn, 14 S. C. 444; and Sagers v. International Smelting Co., 50 Utah 423.

The rule from the time the case was decided

Justice STEPHENS (interposing). I suppose you urge that case with particular vigor, Mr. Knuff. I noticed you smiled. (Laughter.)

Mr. KNUFF. Well, I thought I could be a little more

subtle than that, Your Honor. (Laughter.)

So I say, if Your Honor pleases, that we think that we should be allowed to refresh this witness' recollection by calling his attention to what he said before the Grand Jury, and if the jury is allowed in a criminal case — and the court in the Di Carlo case said they could—to take into consideration the prior testimony before the grand jury, I see no reason why this Court couldn't do likewise.

Justice Stephens. How much of this class of testimony do you think you will have to use? I ask the question

because if we are going to go into a large amount of testimony and it is going to be very important,

perhaps we had better postpone the decision until

we can get a chance to consider these authorities.

Mr. KNUFF. Very little. Frankly, I am surprised by the testimony of this witness. I don't use the word "sur-prise" in the common parlance, I also use it in legal aspects. I say that because yesterday morning Mr. Blagden was in my office. I told Mr. Blagden that he would testify along the lines that he testified to before the grand jury.

I asked Mr. Blagden if he cared to look at his grand jury testimony. Mr. Blagden sat in my office and read his grand jury testimony. I walked over to court with him yesterday, and at no time did Mr. Blagden indicate to me that his testimony would be any different than he gave

before the grand jury.

Now it is true that he read that testimony rather hurriedly, and that possibly if he had an opportunity to consider and read it with some degree of care, probably there would be no necessity to today ask him if certain testimony does refresh his recollection. But as I say, he read it rather hurriedly yesterday, and his answers were a distinct surprise to me.

Now in answer to Your Honor's question, if we propose to do this a great number of times, I can't answer that question because I don't know the attitude that the Government witnesses will adopt. I would like to be able to say that

we don't expect to use it again, but I can't say that.

Justice Stephens. Does any other defendant

wish to be heard?

(No response.)

Justice STEPHENS. Judge Garrett inquires how does the Government happen to be in possession of the grand jury minutes?

Mr. Knuff. It was the Attorney General that conducted the investigation before the additional grand jury, it wasn't the United States Attorney. We had a letter of authority to conduct that grand jury investigation. The Antitrust Division conducted the investigation, and we were furnished, as we usually are furnished, a copy of the grand jury testimony.

Justice Stephens. Is there a Federal statute—we looked for it last night but didn't seem to discover it—permitting the presence of a stenographer before the grand jury?

Mr. Knuff. There is no question about that. Yes.

Justice STEPHENS. We are all used to the old common law practice where not even a stenographer was present before the grand jury.

Mr. KNUFF. I know definitely there is authority for

that.

Mr. Bromley. Does the Court refer to the presence of a stenographer or Government counsel?

a stenographer or Government counsel?

1344 Justice Stephens. The stenographer. The old common law rule in the jurisdictions where I practiced was that not even the District Attorney could be present before the grand jury at the time of the taking of a true

bill. He might advise the grand jury during the proceedings and he might aid them in calling witnesses, but he couldn't argue to them and he couldn't be present during the taking of a bill.

Mr. KNUFF. I can, if Your Honors care to, give you chapter and verse on it. I can't do it right now, but I know

definitely there is -

Justice Stephens (interposing). I am sure there must be. Otherwise there would be no such person present.

Mr. Adams. I am sure now that there is such a statute. Previously it was the practice to have the stenographer designated as an assistant United States Attorney, and in that way it was accomplished, but I think now they have an actual statute on the subject.

Justice STEPHENS. The Court will be in recess for a

few moments.

(Thereupon, a short recess was taken, after which the trial was resumed as follows.).

Justice STEPHENS. We have given consideration to the arguments of counsel, which we appreciate, and have reached the following conclusions.

We are all agreed that the matter is generally within the discretion of the Court, subject to certain limitations which

will be announced later.

That the rule of inviolability of grand jury proceedings seems, by virtue of the Socony-Vacuum case, to be ended in its application, at least so far as permitting the Court to exercise its discretion with respect to using them when the trial is over or the indictments are taken, or the functions of the grand jury ended.

We are agreed that there is no basis for a distinction between civil and criminal cases in respect to the use of

grand jury minutes to refresh recollection.

We are agreed that any material ought to be used to refresh recollection which seems likely to be able to do so,

subject to the limitations about to be announced.

We are agreed that if the material is used to refresh recollection it must be shown to adverse counsel and to the court in order that the court and adverse counsel may have a right to test whether or not it does tend to refresh recollection.

My two colleagues are of the view that despite the Putnam case, which has been referred to in the argument, 162

U. S. 687, Putnam v. United States—that despite the Putnam case, the material which is now sought to be used is usable. I—with great respect to the views of my colleagues—feel bound to disagree with that for this reason. As I understand the Putnam case, it rules that grand jury minutes may be used to refresh recollection in a subsequent proceeding only where the testimony at the grand jury proceeding was contemporaneous with the events which were described in the testimony. Now the witness here was testifying at the grand jury proceedings, as he is now testifying, to events which were not contemporaneous so far as is presently disclosed by his attorney, but to events which occurred in 1925 to 1928, or along in those

years.

The distinction made in the Socony-Vacuum case, with respect to the Putnam case, seems to me not applicable here for the reason that in the Socony-Vacuum case the witness was testifying to not merely alleged conspiratorial events, whereas in the Putnam case it was an isolated event, but also to events in which the witness participated up to the time of his testimony before the grand jury. Whereas, so far as this witness' testimony now discloses, he stopped participating in the events of the alleged conspiracy along about 1928, and therefore was not testifying before the grand jury, so far as presently disclosed, to events contemporaneous with his then testimony.

I confess that I have some doubts concerning the propriety of the Putnam case rule for this reason, that

if the witness was able to remember in his grand. jury testimony three years ago, the events which he was then testifying about, the fact that he was then able to remember indicates that he had a memory at that time, and if he was now shown the minutes, the fact that he had a memory then might possibly refresh his present recollection. It seems to me, therefore, the rule of the Putnam case might be an unwise rule, but nevertheless, unless it is shown that this witness did participate, after he left the industry, in the license arrangements and conversations concerning them, and so on, so as to bring him within what seems to me to be the clear rule of the Putnam case, I feel myself bound by the Putnam decision, and therefore have to respectfully disagree with the views of my colleagues. But I defer to them of course, as the majority, as I am bound to do so far as the ruling of the Court is concerned, and therefore you may proceed with your examination.

Mr. KNUFF. Thank you.

Justice GARRETT. Are there copies of that grand jury testimony available?

Mr. KNUFF. We do not have any copies of the grand jury testimony except this one. I would be glad to have the portion that I am reading subsequently photostated, but we do not have any copies of it.

Justice STEPHENS. Very well, you may proceed with

what you have.

1348 Mr. KNUFF. Because of the nature of the grand jury testimony, we only get a very limited quantity

of those, and they are pretty well guarded.

Thereupon, Augustus S. Blagden, called as a witness for and on behalf of the United States, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION (resumed) by Mr. KNUFF.

Q. Mr. Blagden, I believe you stated that you did appear as a witness before the additional grand jury in May, 1940, is that correct?

A. Yes, sir.

Q. I call your attention, sir -

Mr. Bromley (interposing). I object to this practice

of reading the grand jury minutes into the record.

Justice Stephens. We are all, I think, agreed on that point, Mr. Knuff, that you ought to show the witness the material which you think appropriate, rather than put it in here, because that in effect puts that testimony into the record.

Mr. KNUFF. I am following exactly the procedure in the Socony-Vacuum case, I am following exactly that procedure.

Justice Stephens. I realize that, but nevertheless we are all agreed that the matter is a matter of discretion,

and we think the preferable way to do it is to show

1349 it to the witness.

Mr. KNUFF. I will be glad to do that.

Justice STEPHENS. We are all agreed on that. You may show it to adverse counsel also and to us.

Mr. KNUFF. I did not ask permission of the Court to

come to the witness box, but I presume I have it.

Justice Stephens. It is understood that when counsel has to show an exhibit to the witness, he may come to the witness box.

Mr. KNUFF. Thank you.

By Mr. KNUFF.

Q. I show you, Mr. Blagden, your testimony before the

grand jury beginning at page 2205, where I have indicated with black pencil bracket, and I will ask you to read to and including the bottom of 2212, where I have likewise indicated with black pencil marks.

Mr. KNUFF. May I approach the bench, while the wit-

ness is reading that?

Justice STEPHENS. Yes.

(Discussion at bench-not reported.)

Justice STEPHENS. Let the record show that counsel for the Government, and Mr. Bromley, counsel for the defendant United States Gypsum Company, approached the bench and inquired what the pleasure of the Court was with re-

spect to the procedure as to whether or not the grand jury minutes now being read by the witness should

be first shown to the Court or first shown to defendants' counsel. The Court stated that it was immaterial, and that the minutes might be shown to defendants' counsel and then to the Court. The ruling of course is that the grand jury minutes shall be shown both to defendants' counsel and to the Court before the witness commences to testify concerning those minutes.

The WITNESS. Yes, sir, I have now read that.

Mr. KNUFF. May the record show that the transcript of the grand jury proceedings, beginning on page 2205, is now being shown to defense counsel for their perusal, to and

including page 2212?

Justice STEPHENS. The record may so show. Would it be possible for other defendants' counsel to join the group and go into what, in football terms, is called a "huddle", so we won't have to distribute this to so many different lawyers, and take up unnecessary time? If it would be a little more convenient, we can declare a brief recess.

Mr. OLIVER. If we could read it to the group that would

help.

Justice STEPHENS. The Court will be in recess for five minutes, or whatever length of time is necessary for defendants' counsel to examine the minutes.

(Thereupon, a ten-minute recess was taken, after

1351 which the trial was resumed.)

Mr. KNUFF. If your Honor pleases, may the record show that during the recess the Court has also examined the grand jury minutes from pages 2205 to and including 2212.

Justice Stephens. The record may so show.

### By Mr. KNUFF.

Q. Mr. Blagden, yesterday, at page 1574 of the transcript, I asked you these questions, and you gave the following answers:

"Q. Well, did you contact any other companies to have those companies take out a license agreement with USG?

"A. Only when they asked me about the suit at any time.

"Q. What companies did you contact, sir?

"A. I did not contact them, they contacted me. "Q. All right, what companies did you talk to?

"A. I cannot remember which ones."

I have subsequently shown you your grand jury testimony beginning on page 2205 and extending through 2212. Have you read that grand jury testimony?

A. Yes, sir.

Q. Is your recollection refreshed by reading that grand jury testimony?

A. I did talk to the different members —— Q. (Interposing.) Just answer my question.

A. What was the question?

1352 Mr. KNUFF. Read the question, Mr. Reporter.
(The question referred to was read by the reporter.)

The WITNESS. Yes, sir.

By Mr. KNUFF.

Q. Now then, what companies did you talk to?

A. To the various ones present -

Mr. Bromley (interposing). Wait a minute, give me a chance, Mr. Blagden. I object to this question as repetitious on the ground that these questions were answered at pages 1584 to 1586 of yesterday's record, and in precisely the way that they were answered before the grand jury.

Justice STEPHENS. It is our recollection, Mr. Knuff, that that is true, that the grand jury testimony differs from the testimony of the witness yesterday only in respect of

one or two items:

Mr. KNUFF. That is right.

Justice Stephens, And not with respect to all the list

of persons that he talked to.

Mr. Knuff. That is right. My question at this time was just preliminary to asking him about the different persons in the various companies.

Justice Stephens. Well, if it is a preliminary question, you may proceed.

By Mr. KNUFF.

Q. What companies did you talk to, please?

A. Right now I can't remember the various ones
I talked to. I talked to different ones that were
at the various meetings.

Q. I am asking you about companies.

A. I talked to, as I can remember them, Certainteed —

Q. (Interposing.) Just a second, stop there. With whom

in Certain-teed did you talk to at that time?

Mr. ADAMS. I object to that as being already covered by the record, and as repetitious. I direct your attention to pages 1583 and 1584.

Justice Stephens. The witness testified that he talked to Brown of Certain-teed. In his grand jury testimony

he mentioned, I think, one other person, however,

Mr. KNUFF. That is right.

Justice STEPHENS. Why don't you proceed directly to the points on which you think the testimony differs? It will take up much less time.

Mr. KNUFF. You may strike the last question, Mr. Re-

porter.

By Mr. KNUFF.

Q. Did you talk to Mr. Whittemore? A. I don't think so, I can't remember.

Q. Now then, what other companies did you talk to,

Justice STEPHENS. For the purpose of shortening the testimony you may lead in that aspect. Mention the name of each company and ask him as to the name of each person in that company that he talked to.

1354 By Mr. KNUFF:

Q. As to Ebsary Gypsum Company, state whether or not you talked to the president, Mr. Fred Ebsary.

Mr. Bromley. I object to that as repetitious. He has

already so testified.

Justice STEPHENS. He testified that he talked to Mr. Ebsary and to practically everyone mentioned in the grand jury testimony. Why don't you proceed as follows, to save time? I don't want to interfere too much with your examination but if you would simply say—did you, in ad-

dition to talking to Mr. Ebsary whom you admitted yesterday talking to, also talk to somebody else?

Mr. KNUFF. My recollection was at fault. If it is in the

record, didn't intend to be repetitious.

Mr. Bromley. It is at page 1586 of the record. Justice Jackson. Yes, at page 1586.

By Mr. KNUFF.

Q. Did you talk to Mr. Haggerty?

A. I may have, and probably did. Q. What was your conversation with Mr. Haggerty?

A. I can't remember that.

Q. Well, can you recall the subject-matter that you discussed?

A. Whenever I met these gentlemen they would ask me were we going to take out a license, or had we taken out a license with U.S. Gypsum, and I would tell them we had, and if they would ask me, "Well, what do you think about it?", I would say, "I advise you to join up"

Q. And is that the conversation you had with Mr. Hag-

gerty?

A. I can't remember that, but undoubtedly it was something along that line.

Q. Did you give Mr. Haggerty any reasons other than

what you have mentioned?

A. No, sir; I couldn't remember.

Q. Did you ever talk to Mr. Haggerty about stabilizing prices?

A. I couldn't remember that.

Q: You don't recall whether you talked to him about it? A. No.

Q. Did you talk to Mr. Fuller of Atlantic?

A. Yes, sir, I think that is in my testimony—excuse

Q. What was your conversation with Mr. Fuller, was it

concerning the license agreement?

They hadn't started to make board, and they asked me if I thought it advisable for them to take a license, and I told them I did.

Q. Did you talk to Mr. Gloyd?

1356 A. I think I must have.

Q. And what conversation did you have with him? A. I can't remember exactly, but he would ask me, just as I said with respect to Mr. Haggerty, "Are you going to take out a license?" or, "Have you taken out a license?"-

and I would say, "Yes."

Q. And did you talk to Mr. Griswold?

A. I can't remember.

Q. You can't remember?

A. No. sir.

Q. Now, then, so far you can remember talking to Mr. Brown, Mr. Ebsary, Mr. Haggerty, Mr. Fuller and Mr. Gloyd. Can you remember any other person that you talked to that was engaged in the gypsum wallboard manufacturing business?

A. I undoubtedly talked to some others, but I can't re

member.

Q. You can't remember those?

A. No. sir.

Q. Now coming to Exhibit No. 189-I show you, sir, your grand jury testimony at page 2228 and would ask you to read from page 2228, beginning where I have indicated with a black pencil mark, and extending to the top of page 2229, where I have also indicated with a black pencil mark, for the purpose of refreshing your recollection.

A. Yes, sir.

Justice Stephens. The record may show that the grand jury testimony, at the point shown the witness, has also been shown to the Court and counsel for defendants.

By Mr. KNUFF.

Q. Do you have Exhibit 189 before you, sir?

A. Yes, sir. Q. What did you mean when you said, "I feel that the entente cordiale that has been started between our companies is only a beginner and that if we play the game right it should bring about big things."

Mr. OLIVER. I object to that, your Honor as repetitious.

That question was answered yesterday.

Mr. KNUFF. It was answered yesterday, but answered in quite a different manner than is indicated in the grand jury transcript.

Mr. OLIVER. I refer to his answer yesterday on page 1608

of the transcript.

Mr. KNUFF. It was answered yes.

Justice Stephens. Yes, it was asked and answered yesterday, but there is a divergence which perhaps Government counsel may have in mind, between the phrasing, and he has a right to proceed on that. Overruled.

Mr. Knuff. May I have the question read to the witness?

The WITNESS. May I ask what I said yesterday?

Mr. KNUFF. I haven't any objection to telling you what you said yesterday, not at all.

The question was asked:

"Q. What did you mean by 'entente cordiale'?

"A. The friendship between the two companies."

Mr. BROMLEY. I think you ought to read on.

Mr. KNUFF. I think that the question and answer that I have read is sufficient.

Mr. BROMLEY. I would like permission to read the next

five or six lines, if the Court please.

Justice Stephens. I think the full answer of the witness to that matter should be brought out. Read the next several lines, Mr. Knuff.

Mr. KNUFF. All right, sir. About how many would you care to have me read? Would your Honor indicate that?

Mr. BROMLEY. Down to line 14.

Justice Stephens. Yes, down through line 14, I would say. I think that is fair to the witness.

## By Mr. KNUFF.

Q. You were asked these questions and you gave these answers:

"Q. And what did you mean by 'entente cordiale'?

"A. The friendship between the two companies.

"Q. Were the companies friendly before that, or not? "A. No, sir.

"Q. They weren't friendly? "A. We hadn't been.

1359

"Q. And what did you mean by 'playing the game right'?

A. Living up to the agreement.

"Q. That is, obeying the published prices of USG? "A. Yes, sir."

Now I ask you, sir, what you mean when you said, "I feel that the entente cordiale that has been started between. our companies is only a beginner, and that if we play the game right it should bring about big things"?

Justice Stephens. Where are you reading from?

Mr. KNUFF. That is the question I am now asking him.

Justice STEPHENS. I beg your pardon.

Mr. KNUFF. I am quoting from the letter, and asking him what he meant by that.

The WITNESS. I said in my previous testimony—stability, and I meant by that, that in addition to our taking out

the license, that undoubtedly others would take out licenses and that would tend toward stability.

By Mr. KNUFF.

Q. And by "stability", what do you mean, sir?

A. Stabilizing the prices in the industry.

Mr. KNUFF. You may cross-examine the witness.

CROSS-EXAMINATION by Mr. BROMLEY.

Q. Mr. Blagden, you were shown Exhibit 190 yesterday, your letter to Mr. Avery of October 19, 1926. 1360 Will you look at the first paragraph, please, and tell me what it was that the enclosed check for \$11,752.45 covered?

A. The royalty on board that we had shipped, according

to the license arrangement, as I remember it.

Q. And that royalty was computed at five or some other per cent of the selling price of the board which you had sold during the period covered by the accounting, is that right?

A. That is right.

Q. Now the second paragraph says, "I would rather make no change". Can you recall whether or not you wrote that second paragraph because of some letter which you had received from Mr. Avery prior to your sending Exhibit 190?

A. I cannot now remember the details, but there was some question as to the proper way of making out the price, and that we had better get together and sit down

and thrash out all sides of it.

Q. And do you recollect that the question of the proper way of making out the price was a question raised by United States Gypsum as to whether or not you shouldn't pay royalty on the full price, even in those situations where you sold a jobber and gave him a discount—don't you remember if that was the dispute?

A. We could only sell, as I remember it, at one price, and that was to the dealer, and prices had to be adjust-

ed accordingly.

Q. But on that price you sold to the dealer, you had to pay a royalty, didn't you?

A. That is right.

Q. Now when you sold to a jobber, you sold at that price less a discount, didn't you?

A. I think so.

Q. And you wanted to pay a royalty only on the amount

of money represented by the price less the discount?

A. That is Fight.

Q. And USG wanted you to pay royalty, said you had to under the contract, on the full price, taking the position that the discount was your expense—do you remember that?

A. I can't remember that now.

Mr. Bromley. Mr. Knuff, isn't there a letter in your file that explains this whole thing, that preceded this letter, Exhibit 190?

Mr. KNUFF. I can't say that there is, and I can't say that

there isn't.

Mr. Bromley. Will you take a look?

Mr. KNUFF. In this file here?

Mr. BROMLEY. Yes, the one you had yesterday up on the lectern.

Mr. KNUFF. If you will point it out to me I will answer your question.

1362 Mr. Bromley. Don't you know what it is?

Mr. KNUFF. I don't know what it is that you have reference to.

Mr. BROMLEY. Can I see your file?

Mr. Knuff. Let the record show that the file was handed to Mr. Bromley.

Justice STEPHENS. It may so show.

Mr. Knuff. If your Honor pleases, I was under the impression that counsel was to stand at a considerable dis-

tance from the witness.

Justice STEPHENS. Well, the Court has ruled, gentlemen, in respect to both sides, that counsel should stand at the lectern or near the lectern during the examination except when exhibits are being shown, but when exhibits are being shown to a witness, that obviously is not possible. I just accorded that privilege to you, Mr. Knuff, and we will have to accord it to Mr. Bromley.

Mr. KNUFF. That is all right.

Justice STEPHENS. Equal justice under law we strive to achieve. (Laughter.) These are not ceremonial rules, they are just because we hear better if you will stand farther away, when you can. The witness can lift his voice. Otherwise he carries on a conversation with counsel alone.

Mr. Bromley. I would like to ask Mr. Knuff if he hasn't a letter from Mr. Avery dated September 28, 1926. Mr. KNUFF. I don't know whether I do, and I

63 Mr. ENUFF. I don't know whether 1 do, and I don't know whether I don't have such a letter. If

counsel will indicate the contents of the letter I will make an effort to locate it.

Mr. BROMLEY. A letter to which Exhibit 190 was an

answer.

Mr. KNUFF. May it please the Court, the series of exhibits that I handed to Mr. Bromley today is the same series of exhibits that was passed up to the Court yesterday. I used nothing else in my examination of Mr. Blag-

den yesterday.

Justice STEPHENS. We understand that, but counsel apparently is under the impression that maybe elsewhere you have a letter in your possession written by Mr. Avery to Mr. Blagden, to which the letter of October 19, Exhibit No. 190, is a response. If you do have it, it would perhaps aid the cross-examination.

Mr. KNUFF. I brought over with me the matters that were contained in the file that I gave your Honor, and the file that I used myself. I brought over no other letters. I did not introduce one exhibit which is attached to that

file.

Justice STEPHENS. We understand that, and we do not assume that you are withholding anything at all. But the question is, if you haven't it here, do you think you have such a letter elsewhere, and could you produce it reasonably soon?

Mr. KNUFF. If I have it I will produce it.

Justice Stephens. You may perhaps be able to find it during the noon recess, or before tomorrow. Was such a letter subpoenaed from your files to your knowledge,

1364 Mr. Bromley?

Mr. BROMLEY. Yes, it was. We will look for it too, but I wish you would produce the original if you have it, Mr. Knuff.

Mr. KNUFF. I will, if I have it. Justice STEPHENS. We will now recess.

(Thereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.)

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#### AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

A Justice STEPHENS. Proceed with the cross-examination.
Thereupon, Augustus S. Blagden, the witness on the

stand at the time of recess, resumed the stand and testified further as follows:

#### CROSS-EXAMINATION (resumed).

Mr. BROMLEY. Have you found the letter, Mr. Knuff?

Mr. KNUFF. I haven't been out of the building since Mr. Bromley asked for it. I haven't found the letter.

Justice STEPHENS. Are you laying the foundation for

producing a copy? Do you have a copy?

Mr. Bromley. We have a photostat of what they took, yes, Your Honor.

Mr. KNUFF. If Mr. Bromley will give me the photostat, I will see if I can produce the original, because our files are not set up according to date.

Mr. Bromley. May this photostat be marked for identifiation? May it be marked as Defendants' Exhibit 1?

Justice STEPHENS. I suggested that we use USG 1 and National 1, and so forth because I thought some of the defendants would have separate exhibits applying to them only, but of course I don't know as to that. The Court

has no objection to your using Defendants' Exhibit

1366 1 and following.

Mr. BROMLEY. What do you say, Mr. Johnston?

You are the expert on exhibits.

Mr. Johnston. Because of the number of them, I would say to use the numbers instead of the letters, and just show it as Defendants' Exhibit 1, and so on, and if it is a particular exhibit that applies to just one defendant, attention could be called to it at that time.

Justice Stephens. That is agreeable.

Mr. KNUFF. I haven't any objection to how you are going to mark them, but I just thought that when you were compiling the record in this case there might be an appeal, and it served us a very useful purpose in the Hartford-Empire case to have indicated the name of the defendant, such as USG 1 and Texas 1, and what-not, so we would know by looking at the exhibit itself who introduced it.

Justice STEPHENS. The system suggested now is that unless otherwise indicated, each defendants' exhibit would apply to all defendants, that is much simpler and that is all right.

(The document referred to was marked as Defendants'

Exhibit No. 1 for Identification.)

Mr. BROMLEY. Will you hand these three copies to the

Court, Mr. Marshal?

1367 (The copies were handed to the Court.)

By Mr. BROMLEY.

Q. Mr. Blagden, will you look at Defendants' Exhibit 1 for Identification, please, and read it?

A. Yes, sir.

Q. Doesn't that refresh your recollection so that you can now state that when you paid the royalties on the amount of the business that you had done, you deducted \$1,114.22 out of the total price because that was the amount by which your sales price had been reduced due to the 15 per cent discount which you had given jobbers?

A. Yes, sir.

Q. And you did not, therefore, in your accounting, pay any royalty on the \$1,114.22 which represented the amount of the discount which you had accorded to your jobber customers for the period?

A. That is right.

Q. And in Exhibit 190, you tell Mr. Avery that you would rather make the accounting on that basis until you could get together and discuss it with him?

A. That is right.

Q. It was a matter which concerned the proper interpretation of your license contract, wasn't it?

A. That is right.

Q. And you thought the license contract provided that you did not have to pay a royalty on jobber discount, and Mr. Avery thought that you had to pay a royalty on a jobber discount, is that right?

A. Yes, sir.

Q. Now isn't that all that is referred to in Exhibit 190 in connection with jobbers?

A. Yes, that would be all, in this case.

Q. And isn't it a fact that, contrary to Mr. Knuff's suggestion in his examination of you, it had nothing to do with the question of eliminating jobbers whatsoever?

A. That is right.

Justice STEPHENS. Mr. Bromley, let me be sure that I understand this. Is this \$1,114.22 the amount which was deducted before the royalties were figured, or the amount deducted from the royalty check itself?

Mr. BROMLEY. It was the amount deducted before the royalties were figured. That is right, Mr. Blagden, is it

not?

The WITNESS. Yes, sir.

Mr. Bromley. So the net result was that he did not pay his 5 per cent on \$1,114.22, according to his contention.

Now, Mr. Knuff, will you make a search for the original of this, and see if you can produce it tomorrow, please? Mr. KNUFF. I will.

## By Mr. BROMLEY.

Q. And therefore, I take it it is correct, Mr. Blagden, that neither these letters nor your subsequent discussion with Mr. Avery nad anything to do with making the price to the jobber the same as to the dealer, as was suggested by Mr. Knuff on page 1611?

A. That is right, they couldn't be the same.

Q. Mr. Blagden, Exhibit 184, your letter to Mr. Avery, refers to a settlement discussion which you had with Mr. Avery in Chicago some time in December, 1925, does it not?

A. Is that the settlement of the suit?

Q. I show you Exhibit 184, and ask you to look at the first paragraph.

A. Yes, sir. Q. Do you recall that you met Mr. Avery in Chicago and you went over to a club called the Attic Club some few days before the letter, Exhibit 184?

A. Yes, sir.

Q. And that you had luncheon at the Attic Club with Mr. Avery?

A. That is right.

Q. And that you two were alone?

A. That is right.

Q. And it was at that meeting that you discussed settlement with Mr. Avery, was it?

A. That is right.

1370 Q. And Mr. Avery told you then, didn't he, the terms on which he would settle?

A. That is right.

Q. He told you that he would want you to pay damages, didn't he?

A. Yes, sir.

Q. And that he would want you to acknowledge the validity of his patents?

A. That is right.

Q. And that he would want you to pay a royalty for future use under the license, didn't he?

A. Yes, sir.

Q. And finally, that he wanted the right to fix your

Carl I

prices if you took a license?

A. That is right.

Q. Now is it a fact that at that luncheon you finally got down to the terms of settlement so far as the quarter of a million dollars was concerned?

A. I don't remember that, whether we did it then or not. I couldn't remember whether we decided on the

amount at that sitting.

Q. Then you don't remember whether you made, in effect, an oral agreement of settlement at that luncheon or not?

A. No, sir.

Q. And do you remember whether Mr. Avery made you any offer, in terms of dollars, for you to take back 1371 to your Board?

A. No, sir, I don't remember that.

Q. At any rate, you did not have with you, so you told Mr. Johnston, I believe, this memorandum, Exhibit 185?

A. No, sir, that came after.

Q. Therefore, I take it you did not discuss that memorandum with Mr. Avery?

A. Not at that sitting.

Q. Now when you got back to your office, did you find that your lawyer had prepared this memorandum?

A. Yes, sir.

Q. And you sent it to Mr. Avery with your letter of December 12, 1925?

A. That is right.

Q. You were not in favor of sending it to him, were

A. I can't remember it exactly. We discussed it at length, whether it would be a good thing to send it or not.

Q. Who discussed it?

A. I discussed it with Mr. Mitchell, our attorney.

Q. Well, you thought it was hardly the proper way to approach Mr. Avery, didn't you?

A. Yes, I had a very decided opinion on that.

Q. What was the decided opinion which you expressed to Mr. Mitchell with respect to this memorandum? A. I thought there was just too much of it.

Q. And that it would not appeal to Mr. Avery?

A. Yes.

Q. But you finally determined to send it, and you did send it; is that right?

A. Yes.

Q. Now you have testified, as I understand you, to two

sets of meetings, one that you have called industry or gypsum meetings, and the other you have called licensee meetings; is that right?

A. That is right.
Q. The meetings other than licensee meetings, to which you have referred throughout your direct-examination, were the general periodical meetings of all members of the gypsum industry, were they not?

A. That is right.

Q. And those meetings were not limited to board manufacturers, were they?

A. No, sir.

Q. There were there in attendance many companies that didn't make board at all?

A. That is right.Q. That made only plaster or block or some other gypsum product?

1373 A. Yes.

Q. And in your testimony which you gave on direct, whenever you refer to a meeting without calling it a licensee meeting, you intend to refer to these general meetings of the entire industry, do you?

A. That is right.

Q. Now there never was an occasion, was there, Mr. Blagden, when the subject matter of wallboard licenses was taken up at a general industry meeting?

A. No, sir.

Q. And whatever discussion there may have been with respect to your situation, occurred after the meeting or before the meeting as individuals might approach you?

A. That is right. They might have approached me at the regular meeting, as individuals, and asked me about

it.

Q. But of course, those meetings weren't called for the purpose of talking about taking licenses?

A. No, sir.

Q. And such discussions as you may have had with individual manufacturers were not a part of any formal meeting or the subject of any meeting?

A. No, sir.

Q. You said at page 1583, line 4, "The Atlantic Gypsum Company hadn't taken out a license and didn't attend those meetings, as I remember."

Now as I understand that reference, you were talking about general meetings and not about licensee meetings?

A. That is right.

Q. Well, it didn't make any difference, did it, whether Atlantic had a license or not, in so far as attendance upon general meetings was concerned?

A. No, sir.

Q. So you were mistaken, were you not, if you were talking about general meetings, in saying that Atlantic didn't attend because it hadn't taken out a license? That wouldn't have had anything to do with it, would it?

A. That is right.

Q. Now coming to the second subject matter, that is, licensee meetings, the only people who ever attended licensee meetings while you were in the industry were such of the manufacturers as may have had licenses from USG?

A. That is right.

Q. And of course, during the time that you were in the industry, there were never more than four of such companies?

A. I don't remember the exact number.

Q. I think the record shows that there were Beaver and Universal and Atlantic and Texas, being the only ones who were licensees at any time while you were in the industry. Does that refresh your recollection?

1375 A. There were about that number.

Q. So when you talk about licensee meetings as distinguished from general meetings, it would only be those four, or some of them, who had representatives in attendance at licensee meetings, wouldn't it?

A. That is right.

Q. And those licensee meetings were ealled to discuss operations under the license?

A. That is right.

O. And that is all

Q. And that is all? A. That is right.

Q. From the time that you took your license in July, 1926, until the time you left the industry in 1928, isn't it a fact that there were very few of these licensee meetings?

A. That is right.

Q. Have you any idea how many?

A. Only two or three at the most, that I can remember,

or maybe just two.

Q. Now I show you Exhibit 194, which is your letter to Mr. Avery of September 21, 1927, and ask you to look at the last paragraph. Do you see the reference to "and thought it an excellent plan"?

A. Yes, sir.

Q. You understood that, didn't you, Mr. Blagden, to be a reference by Mr. Fuller merely to the suggestion made by Mr. Avery that the licensees have a meet-1376 ing?

A. That is right, it couldn't be anything else.

Q. And it couldn't be anything else because the first paragraph of your letter to Mr. Avery says, "I have your letter of September 15 in regard to a meeting of the Board of licensees"-it means "board licensees", doesn't it?

A. Yes, sir.
Q. That word "of" is a mistake, isn't it?

A. It should be just the licensees.

A. Yes, "to a meeting of the board licensees"-isn't that the way it should have read?

A. Yes, sir. Q. And you understood that Mr. Fuller's reference to an excellent plan to be merely his judgment of Mr. Avery's suggestion that the board licensees have a meeting, is that right?

A. That is right.

Q. You said in your direct testimony that you looked upon your company as a guinea pig, so far as settlement with USG was concerned. Now did the negotiation and execution of the Beaver license in July, 1926, have any connection with any other company, in any shape, form or manner?

A. No. sir.

Q. And what were your reasons for urging your company to take and finally taking a license as it did in 1926?

1377 A. Well, we had lost the patent suit on two occasions, that is, we had lost our case with the United States Gypsum Company on two occasions, and after studying the situation deeply I felt that we would lose in a higher court, and if we could possibly get together and settle the matter it would be best to do so.

Q. Did you also consider, Mr. Blagden, that it was very important to your company to get the right to make this closed-edge product in order to satisfy the demands of

your customers?

A. We had definitely proven that the closed-edge board was the cheapest board to manufacture, and we had tried every other way, and even though we had to pay a royalty we thought it would save us money in the long run.

Q. And what about the demand of your customers for

this type of closed-edge board as opposed to open-edge?

A. They were emphatic about that. Q. They wanted it, that is?

A. They wanted the closed-edge.

Q. And the fact, is, of course, that ever since you came with the company, and indeed ever since the Beaver Company had been in existence, the only type of board it had made was a closed-edge?

A. We made for a while a semi-closed edge. Q. Yes, but some type of closed edge?

A. That is right.

Q. And were you concerned, and was it a reason for your decision to take a license, about the contingent liability which was constantly hanging over the company's head by way of liability for damages?

A. Yes, sir.

Q. Was that a reason why you wanted to take a license?

A. That was a great big reason.

Q. And is it true to say, Mr. Blagden, that you were one of those business men who had a natural dislike for litigation?

A. Yes, sir. I tried to see if we couldn't settle it out of court as soon as I found out the true situation, after

becoming president of the company.

Q. Now what can you say as to whether or not Mr. Avery's insistence on price-fixing was a factor in your determination to settle?

A. Say that again?

Q. Well, I will withdraw it. Was price-fixing an important element, to your mind, or would you have taken a license without it, or what was your attitude towards the fixing of prices which Avery insisted upon?

A. That wasn't important in my mind, not as I remem-

ber.

Q. Is it fair to say, then, sir, that you would have taken a license without such a provision?

A. Surely.

Q. The record shows that the Universal Company took a contract next after you, in September, 1926. Did you have anything to do with their taking that contract?

A. No. sir. Q. The record also shows that the Atlantic Company took their contract in March, 1927. Did you have anything

to do whatsoever with their taking the license?

A. No, sir, except to answer questions that the individuals may have asked me from time to time.

Q. Did you have any part in the negotiations?

A. No, sir.

Q. The Texas Company, the record shows, took its license in April, 1927. Did you have any connection with the taking of that license?

A. No. sir.

Q. Now did the board license which you took in any manner, by way of understanding or agreement, have anything to do with the prices of plaster or other miscellaneous gypsum products?

A. No. sir.

Q. And it is a fact, isn't it, that you at no time had any understanding with Mr. Avery or anybody else as to the prices of plaster or other unpatented gypsum articles?

A. There was no understanding.

1380 Q. As a matter of fact, did you ever have any understanding or agreement or even discussion with Mr. Avery as to what the price would be which he should fix under the license if you took it?

A. No. sir.

Q. And after you took it, did you ever have any understanding or agreement or even discussion with him as to what price he would fix for the patented articles?

A. I can't remember. I may have questioned him on the price; I can't remember anything about it; though, now.

Q. Did you have any understanding with him as to what price he would fix?

A. No. sir.

Q. Is it a fact that according to your best recollection, if you did raise the subject matter with him, he told you he wouldn't discuss it with you?

A. I don't remember that.

Q. On page 1608 of your testimony, the part which was read to you this morning, and particularly beginning at line 11, all in reference to Exhibit 189, which is your letter to Mr. Avery of October 1, 1926, this question and answer appear:

"Q. And what did you mean by 'playing the game right'?

"A. Living up to the agreement."

Isn't it a fact that in that answer, when you used the word "agreement", you meant license agreement?

A. That is right.
Q. Now wasn't your use of the phrase "entente cordiale" in the third sentence of the second paragraph of that letter, merely your expression of the better feeling that might result, probably would result, from the settlement and license which you had taken?

A. Yes, sir.

Mr. BROMLEY: May I have Exhibit 189, please?

(Exhibit 189 handed to Mr. Bromley, and by him to the witness.)

## By Mr. BROMLEY.

Q. You felt, didn't you, Mr. Blagden, that your company should live up to the agreement?

A. Absolutely.

Q. And there came a time, did there not, early in 1928, when the Certain-teed Company bought the Beaver Company, or its assets?

A. That is right.

Q. And you very soon found out after that occurrence that the management of the Certain-teed Company were not going to live up to your agreement, didn't you?

A. Yes.

Q. And it is a fact, isn't it, that you learned from Mr. George Brown, the President of Certain-teed, that he was not going to assume your contract, but to tell USG that he would not be bound by it?

1382 A. That is right.

Q. You did not agree with Mr. Brown in that position, did your

A. No. sir.

Q. And you urged him to assume your license and to live up to the agreement, didn't you?

A. Yes.

Q. And for that purpose you had several talks with Mr: Brown, didn't you?

A. I can't remember how many. I at least had one or

two.

Q. Well, don't you remember that you not only advised Mr. Brown to assume, on behalf of Certain-teed, the Beaver license, but that you arranged a meeting between Mr. Brown and Mr. Avery in Chicago, at the Chicago Club, in order to discuss the matter?

A. That is right.

Q. And isn't that the subject matter of Exhibits 195 and 196, the first one being your wire to Mr. Avery of February 27, 1928, and the second being Mr. Avery's re-bly?

A. Yes, sir.

Q. Now wasn't the purpose of the meeting referred to in Exhibit 195, so far as you were concerned, to bring Mr.

C. O. Brown and Mr. Avery together, in an effort to see if you couldn't work out an arrangement whereby the Certain-teed Company would assume the Beaver license?

A. Yes. sir.

Q. And that is the only purpose of the meeting referred to in Exhibit 195, isn't that so?

A. I would think so.

Q. And that telegram, Exhibit 195, is dated several weeks after there had been executed a contract for the purchase of the Beaver assets by the Certain-teed Company; isn't that right?

A. I don't remember the date.

Q. Don't you remember that that contract was in January, 1928?

A. That is right.

Q. So that you stayed on with the new Certain-teed organization from January, 1928, for a period of 3 or 4 months before you left, did you not?

A. I don't remember the exact time, but I was on for

a while.

Q. I thought you said you left the industry in April, 1928.

A. Did I?

Q. I thought so.

A. I don't remember.

Q. I don't either, but I thought that was it.

1384 Well, at any rate, can you recall that you

(Interposing.) I was on for a while afterwards.

Q. And that meant you were on as an employee of the Certain-teed Company, didn't it?

A. Yes, sir.

Q. Now Exhibit 196, Mr. Avery's wire—can you remember whether, as a result of that, a meeting did occur between Mr. Avery and either Mr. Brown-either Mr. George Brown or Mr. C. O. Brown?

A. There was a meeting of Mr. George Brown and Mr.

Avery and myself out in Chicago.

Q. There was? A. Yes, I remember that well.

Q. And is the reference in the last sentence of Exhibit 196 a reference to this matter of whether or not Certainteed should take over and assume the Beaver license?

A. That had to do with the license, yes, sir.

Q. The reference to "the license stand we have taken is

firm and unless Certain-teed wishes to propose action in practical accord with it, any conference is useless," is a reference to Mr. Avery's insistence that Certain-teed was bound to take over the Beaver license, is it not?

A. That is right.

Q. And did you know that thereafter Mr. Brown persisted in his refusal, and that resulted in another law-suit between USG and Certain-teed?

1385 - A. I heard that that was the case.

Q. Did you know that prior to the sending of Exhibit 195, the Certain-teed Company had received a formal notification from USG, or its lawyers, demanding that Certain-teed should assume the Beaver license?

A. I don't remember that.

Q. Now in connection with USG's answer to Interrogatory No. 22, there was a reference in the answer to a meeting of February 26, 1926, in New York, between you and Mr. Avery. Do you recall that in February, 1926, that is, after your Attic Club meeting in December, 1925, Mr. Avery went abroad for an extended trip?

A. I remember he was away for some time.

Q. Well, do you remember that in February, 1926, you went to the steamer to say goodby to him?

A. I don't remember that.

Q. Are you able to tell us whether, in February, 1926, you did see him in New York and say goodby to him?

A., I can't remember that now.

Q. Can you remember whether, in February, 1926, you had any discussion with him about the Beaver Company taking a license?

A. Was that before we had taken a license?

Q. Yes, you took the license in July, 1926, and you 1386 had the Attic Club meeting in December, 1925.

A. Well, that would have been the topic of con-

versation, all right.

Q. But don't you remember that as a matter of fact, you had no conversation with him except to bid him goodby because he was going abroad?

A. Well, that was the main subject of the meeting, nat-

urally.

Q. It was?

A. Well, I can't remember it now.

Q. You don't remember anything about it?

A. No, sir.

Q: You said in your examination-in-chief that in your

negotiations with Mr. Avery it was assumed that USG would have the right to fix the price. Now as a matter of fact, it was only assumed because that was one of the terms that Mr. Avery laid down from the outset, wasn't it?

A. That is right.

Q. And when you said it was assumed, you meant that after he had laid that down as a term and you had agreed to it, that thereafter it was assumed that that would be in the contract?

A. That is right.

Q. You also said that by signing the license agreement you intended to make closed-edge board. Now I ask you,

you didn't mean to say that under the agreement you were required to make only closed-edge board,

did you?

A. Well, we wanted to make closed-edge board, and we signed the agreement so that we could make closed-edge board.

Q. But so far as any understanding with Mr. Avery or anybody else was concerned, you were always free, after you signed the agreement, to make open-edge board if you wanted to, weren't you?

A. I don't remember that.

Mr. KNUFF. Just a moment. The question is objected to because the agreement speaks for itself.

Mr. BROMLEY. I will withdraw it.

By Mr. BROMLEY.

Q. Did you have any understanding, outside of the agreement, that you would not be free to make open-edge board?

A. I don't remember.

Q. Well, don't you remember that as a matter of fact, at all times you knew you were free to make any type board you wanted to?

A. Well, I suppose that is all right, but I don't remember that. We only wanted to make the one board, and that was the closed-edge board, and that is why we signed the agreement.

Q. Put it this way: Did you ever promise Mr. Avery or anybody else that you would not make open-edge board?

A. No, I don't remember that.

Q. When you say "you don't remember that", you mean you never did promise him, to your best recollection, don't you?

A. I would think so.

Q. You also said in your direct-examination that in the second suit which USG brought against Beaver, at some time or other you caused the appeal to be withdrawn. As a matter of fact, that appeal was not withdrawn or dismissed until after you had made your settlement and signed up your settlement contract and your license agreement, Exhibit 1; isn't that right?

A. I am not sure about that. Q. Well, you wouldn't withdraw your appeal before you settled your lawsuit?

A. That is right.

Q. So your recollection is that you didn't withdraw the appeal until after you settled the suit?

A. That is right.

Q. Coming to the subject matter of these patents which you assigned under the terms of the settlement agreement, don't you remember, Mr. Blagden, that in your settlement negotiations, Mr. Avery took the position that he was not concerned with your patents, and didn't care anything about them; but that after the patent lawyers for both companies got into the matter they insisted that

1389 your company make the assignment of your patents. in order to avoid the possibility of future contro-

versy between your patents and USG's patents?

A. I don't remember that. Mr. BROMLEY. That is all.

Justice Stephens. Do any other defendants wish to cross-examine?

Mr. ADAMS. No.

Mr. FINCK. No cross-examination.

Justice Stephens. If no other defendants desire to crossexamine, do you have any re-direct?

Mr. KNUFF. No re-direct-examination, Your Honor. Justice STEPHENS. Is this all that is desired of this witness?

Mr. KNUFF. As far as the Government is concerned, that is all we desire of this witness.

Mr. BROMLEY. That is all.

Justice STEPHENS. You may be excused, Mr. Blagden. Thank you for attending the court.

(Witness excused.)

Mr. KNUFF. I will have to crave Your Honors' indulgence for just a minute. Mr. Steffen, I might say, went over to the infirmary during the lunch hour. He is running a high temperature, and he went home.

Justice STEPHENS. All right, take your time.

subpoenaed Mr. F. E. Davis, the Secretary of the National Gypsum Company, for the purpose of identifying the minutes of the National Gypsum Company. Mr. Finck and myself have agreed that Exhibits 197 to 201, inclusive, are the original minutes of the National Gypsum Company; that they were signed by Mr. Davis as it appears thereon; that Mr. Davis is the Secretary of the National Gypsum Company, and if he were here today he would identify these minutes as the minutes, and that he is the proper officer to have custody of them.

Am I correct in that, Mr. Finck?

Mr. FINCK. You are.

Justice STEPHENS. The stipulation may be shown.

Mr. Knuff. We now offer in evidence, if Your Honor pleases, Exhibit 197, the same being the minutes of the meeting of the Board of Directors of the National Gypsum Company held at the principal office of the corporation, 409 Jackson Building in the City of Buffalo, on the 27th day of November, 1928, pursuant to notice.

Mr. FINCK. If the Court please, on these exhibits that are now being offered, I think that they should be offered by the Government submitting just such parts as are relevant and material. There are a great many things in the minutes that have no relationship or materiality to this case, and I think the Government should be limited to

those parts which are material.

1391 Mr. KNUFF. I am agreeable to that, Your Honor, and I will indicate on each exhibit that portion of the exhibit that we desire to have the Court consider.

Justice Stephens. Very well.

Mr. KNUFF. On Exhibit No. 197, we think that the entire exhibit—it is a very short exhibit—should be received.

We now offer in evidence Exhibit 198, the same being the minutes of a special meeting of the Board of Directors of the National Gypsum Company held at the principal office of the corporation at No. 409 Jackson Building, in the City of Buffalo, on the 14th day of May, 1929, pursuant to notice. The part that we are particularly interested in at this time is the first two pages of the exhibit.

We also offer in evidence Government's Exhibit 199, the same being the minutes of the meeting of the Board of Directors of the National Gypsum Company held at the principal office of the corporation at No. 409 Jackson

Building, in the City of Buffalo, New York, on the 28th day of May, 1929, pursuant to notice. The portion that we are particularly interested in is the first paragraph on page 1, and the last paragraph on page 1.

Justice Stephens. Running over onto page 2?

Mr. KNUFF. Running through the enumeration of various products, Gold Bond, and so forth, which would be about one-third down the page, ending with "Sec-1392 onds \$15.00".

Mr. Johnston. If the Court please, may I make

a suggestion in reference to that?

Justice STEPHENS. Yes.

Mr. Johnston. The way you are putting it in, it almost becomes necessary then for the reporter to take these exhibits and copy into the record that part of them. Why not have counsel for the Government and counsel for National agree upon those parts of the minutes that would go in, and then copy those excerpts and just introduce them as exhibits. It will make the record much shorter and will be much more convenient.

Justice Stephens. If you are just introducing the ex-

cerpts, they won't identify themselves.

Mr. Johnston. You would identify it by a memorandum at the top of the exhibit. Otherwise, you might just as well introduce the whole exhibits, because you have got them all in the record anyway.

Justice Stephens. These are not going to be copied

into the record.

Mr. FINCK. I didn't understand that.

Mr. KNUFF. I didn't understand that either.

Justice STEPHENS. These aren't going to be copied into the transcript. As I understand it, we are following the plan already agreed upon, after some discussion, that

these exhibits shall be marked and introduced in evidence as exhibits; and of course the whole ex-

hibit physically is in the record.

Mr. JOHNSTON. That is what I am saying.

Justice STEPHENS. But counsel is calling attention to the fact that the Government relies upon special portions of the exhibit which are designated in the record. Do you see any objection to that?

Mr. FINCK. I see no reason for copying the two or three

pages of the minutes of May 14, 1929, in the record.

Justice STEPHENS. I don't understand we are copying anything in the record.

Mr. FINCK. I mean, I see no reason for its being a part

of the exhibit. It has no relation to the issues in this case at all.

Justice Stephens. Very true; but it is quite difficult to segregate or strip out one part of an exhibit from another except by identifying it. The Court doesn't care, whatever is convenient to counsel, but it seems to us that the present method is reasonably convenient. When the exhibit is examined, if the case should ever reach an appellate stage, when the exhibit is examined in connection with the transcript, the reader will be able to tell what part of the exhibit is relied upon by the Government. What is your suggestion?

Mr. FINCK. I would be very glad to agree with Mr. Knuff on the parts of the minutes that he desires as ex-

hibits, and then put in such part, so that the record

1394 will not contain a lot of immaterial matter.

Justice STEPHENS. How are you going to put in such parts, since they are not to be copied into the transcript, without cutting them out of this exhibit?

Mr. FINCK. That is what I thought we would do, cut

them out of the exhibits.

Justice STEPHENS. You mean physically cut them out?

Mr. FINCK. Physically cut them out.

Justice STEPHENS. That seems undesirable to me, because the exhibit is identified now because of the legend at the top, and if you cut these portions out it is going to take a lot of labor and time in putting a new identification upon them. However, if the Government has no objection to that and counsel are all agreed that it is more convenient, the Court has no objection.

Mr. KNUFF. I agree with what Your Honor just said. I can't conceive how what I am now doing is in any way.

going to encumber this record.

Justice STEPHENS. Are there any portions of these exhibits which it is improper to have in the record, do you think, Mr. Finck?

Mr. FINCK. Oh, I think not. It is just matter that is

sort of private.

Justice STEPHENS. The Court thinks that we had better go along as we are now going. You can identify, by telling the Court Reporter, in the record, care-

fully, as you are doing, Mr. Knuff, what particular portions of the exhibit the Government is relying upon. The Court will then be able to disregard the balance. It seems to me that if this case should ever reach an appellate stage, that when the ultimate record on appeal is pre-

pared the eliminations can be made then, if necessary, so that no more of the exhibit than is necessary will appear in

the appellate record.

Mr. Knuff. I offer in evidence Government's Exhibit 200, the same being the minutes of the meeting of the Board of Directors of the National Gypsum Company held at the principal office of the corporation at No. 409 Jackson Building in the City of Buffalo, New York, on the 23rd day of July, 1929, pursuant to notice.

In connection with this exhibit I offer everything in it

In connection with this exhibit I offer everything in it except the last paragraph, beginning "Mr. Burkhardt suggested the advisability", and so forth—everything but that

paragraph.

Justice Stephens. You don't offer the following paragraph, do you, the last two paragraphs you eliminate?

Mr. KNUFF. That is right, Your Honor.

I now offer in evidence Government's Exhibit No. 201, the same being the minutes of a meeting of the Board of Directors of the National Gypsum Company held at the

Hamilton Golf and Country Club, Ancaster, On-1396 tario, on the 27th of August, 1929, pursuant to

notice:

In particular, I offer the entire exhibit except the last three paragraphs. That elimination would begin with, "Mr. Burkhardt recommended that the corporation insure the life", and so forth. From there on I am not interested.

Justice Stephens. Are you offering these all at once

now?

Mr. KNUFF. I am, Your Honor.

Justice STEPHENS. Let the Court then take a moment to read them, so we will have them in mind.

Mr. KNUFF. May we have a recess while the Court is

examining those?

Justice Stephens. Yes, the Court may be in recess. We will remain in the room.

(Short informal recess.)

Justice Stephens. You may proceed, gentlemen.

Exhibits 197 to 201, inclusive, have been offered. Are

Mr. Bromley. Only the usual one, if Your Honor please.

Mr. Johnston. We have the additional objection that these exhibits have no materiality as to Mr. Gloyd. They are minutes of meetings of Directors of the National Company, and I can't see where they would be admissible as to us at all.

1397 Justice Stephens. Are you offering them as declarations of alleged co-conspirators?

Mr. KNUFF. We are, Your Honor.

Mr. JOHNSTON. Well, could they be that, even?

Justice STEPHENS. Well, I will hear you further, Mr. Johnston, but I don't see why they are to be differentiated from letters or any other statements made by alleged co-conspirators. They, of course, will be received subject to the general reservation that the Court has made. But why are they any less declarations of alleged co-conspirators than any of these other exhibits?

Mr. Johnston. Well, I don't want to take the time of the Court on an argument. It is merely equivalent to a man making a statement about himself and writing it down. If you could reduce the corporate entity to an in-

dividual, it would be equivalent to that.

Justice STEPHENS. You mean to draw the distinction that the other alleged declarations were uttered to other persons; whereas, these are uttered, so to speak to the company itself?

Mr. JOHNSTON. Yes.

Justice STEPHENS. We think that, of course, whether they are treated as declarations or admissions, they would be binding as against other co-conspirators than those by whom they are made, to-wit, National, only after the

prima facie proof of a conspiracy has been made, and they are all received subject to that distinction.

But we think, Mr. Johnston, that the fact that they are not at the moment communicated to someone else would not necessarily declassify them as competent and relevant admissions or declarations.

The objection is overruled. The exhibits are received

subject to the reservation which the Court has made.

(The documents referred to, marked as Government's Exhibits 197 to 201, inclusive, were received in evidence.)

Mr. KNUFF. Mr. Eugene Holland!

Thereupon, EUGENE HOLLAND, called as a witness for and on behalf of the United States, having been first duly sworn, testified as follows:

### DIRECT EXAMINATION by Mr. KNUFF.

- Q. Your full name is what, sir?
- A. Eugene Holland.
- Q. H-o-l-l-a-n-d?
- A. That is correct.

Q. Where do you live, Mr. Holland?

A. Glencoe, Illinois.

Q. By whom are you employed?

A. The Florence Stove Company.

Q. In what capacity?

A. Vice President.

Q. How long have you been connected with the Florence Stove Company?

A. Approximately four years.

Q. And what are your duties with the Florence Stove

A. I have the title of Vice President in Charge of Op-

erations.

Q. The Florence Stove Company is a manufacturing concern, is it?

A. Yes, sir.

Q. And your duties include the direction of the manufacturing of that company, is that correct?

A. Yes.

Q. Were you subpoenaed as a Government witness, sir?

A. Yes.

Q. And did you also appear and testify before the Grand Jury, the additional Grand Jury, in the District of Columbia in 1940?

A. Yes. Q. Were you formerly associated with any company that was engaged in the gypsum business?

A. Yes, sir.

Q. With what company, sir? 1400

A. The Universal Gypsum & Lime Company. Q. When did you enter the employ of the Universal Gypsum & Lime Company?

A. In January, 1928.

Q. And how long did you stay in the industry? A. I think until about August, 1935.

Q. State the position that you had with the Universal

Company?

A. I was President and General Manager until the time that the company was placed in receivership, and at that time I resigned as President and General Manager and became the operating receiver.

Q. There was more than one receiver, was there not?

A. Yes, there were several.

Q. And your associates were whom?

A. Abel Davis, and then there were ancillary receivers.

1401 Q. When was the receivership terminated, if you know?

A. I don't know that.

Q. Can you give us the approximate date?

A. I think it was some time in 1935.

Q. And at about that time you left the Universal, is that correct?

A. Yes. I don't understand what you mean by "terminated"?

Q. When were the receivers discharged?

A. I don't remember what date.

Q. It was around, however, 1935, is that your best judgment?

A. 1934 or 1935, the latter part of 1934 or the early

part of 1935.

Q. So that you were engaged in the gypsum business approximately seven years, from 1928 down to 1935? A. That is right.

Q. How many plants did Universal have?

A. I think seven.

Q. Where were those plants located?

A. One of them was in Akron, New York; Fort Dodge, Iowa—do you want the lime plants too?

Q. Yes.

A. York, Pennsylvania. Then there was a lime plant in Virginia.

Q. At Plasterco? 1402

A. No, Arando, Virginia; and we had a plant At one time we owned a subsidiary company at Newburgh, New York, with a plant there; and a quarry up in Nova Scotia. I think that is about all.

Q. What products did the Universal manufacture, sir?

A. Gypsum wallboard and gypsum plaster and lime. Q. Will you name the plants where you manufactured wallboard?

A. Fort Dodge, Iowa; Akron, New York and Rotan, Texas.

Q. Did you manufacture any block?

A. Yes, at one plant.
Q. And what types of wallboard did you manufacture, as to the edge, I mean, an open-edge, or a closed-edge?

Closed-edge.

Q. Through what area of the United States did you sell your products?

Justice Jackson. All of them? Mr. KNUFF. Yes, sir.

The WITNESS. Well, East of the Rocky Mountains, although on our lime products, or some of those things, we didn't go very far away from the plant. We did not have complete coverage east of the Rockies.

By Mr. KNUFF.

Q. So far as your gypsum board and gypsum plaster were concerned, you had more or less general coverage throughout the entire United States east of the Rocky Mountains, is that a fair statement?

A. Well, I think that is a little exaggerated. There were

some localities where it was pretty spotty.

Q. Will you then correct me?

A. Well, I don't know that I could; I don't believe that

I could.

Justice Stephens. As a matter of curiosity—perhaps it is not material under the issues—but to satisfy the curiosity of at least one of the members of the Court why does this particular gypsum business seem to have been confined to the Eastern area, didn't the Western part of the United States use gypsum board and wall board and gyp-

sum plaster and gypsum tile?

Mr. Knuff. Probably they did, but the conspiracy only involved those board manufacturers that sold East of the Rocky Mountains. The famous perforated lath was of course sold on the West Coast and had been sold on the West Coast for quite a number of years. But the companies on the West Coast, as we view the conspiracy, were not involved in it, it was just the companies East of the Rocky Mountains.

Justice STEPHENS. I wasn't asking so much about the conspiracy, but as to how it happened that these particular companies dealt East of the Rockies, and possibly some

others we don't know about dealt on the West Coast.

Was there a natural cleavage at the Continental Di-

vide, or something of that sort?

Mr. KNUFF. I am sorry, Your Honor, but I am not

enough of an expert to know.

Mr. Bromley. The United States Gypsum Company, as I understand it, always operated West of the Rocky Mountains, and made no such distinction. I think this is a distinction created largely by the Government. I think other companies operated there too.

Justice STEPHENS. Thank you, gentlemen, I didn't mean to take much time on that, I was just curious. You may

proceed.

By Mr. KNUFF.

Q. Were you familiar with the executives of other companies that were also engaged in the gypsum basiness?

A. I became acquainted with them.

Q. Did you know any of the executives of Atlantic?

Q. Did you know Mr. Fuller?

A. Yes.

Q. Did you know Mr. Channing?

A. Yes.

Q. Did you know Mr. Neale?

A. Yes.

Q. Did you know anybody connected with American?

A. Yes.

Q. Did you know Mr. Griswold?

A. Yes. Q. Mr. Black?

A. Yes.

Q. .dr. Kling?

A. Yes.
Q. Did you know anyone connected with Certain-teed?

A. Yes.

Q. Would you name the people that you knew at Certainteed?

. A. Mr. George Brown, Mr. C. O. Brown, Mr. Whittemore and Mr. Walker.

Q. Mr. L. R. Walker or Elisha Walker-there 1406 were two Walkers.

A. Yes, I knew both of them?

Q. Did you know Warren Henley?

A. Yes.
Q. Did you know anyone connected with Ebsary?

A. Yes.

Q. Will you name those whom you knew with the Ebsary Gypsum Company?

A. Mr. Ebsary and Mr. Lenci.

Q. Now as to Niagara, did you know the officials of that company?

A. Was that Mr. Reeb's company?

Q. Yes.

A. I knew Mr. Reeb.

Q. Did you know anybody with National?

Q. Will you tell us the officials there that you were acquainted with?

. Mr. Haggerty, Mr. Baker, Mr. Williams, Mr. Finck, and Mr. Burley.

Q. Ralph Burley?

A. Yes.

Q. Did you know anyone connected with Texas?

1407 A. Yes.

Q. Who?

A. Mr. Gloyd and Mr. Chism.

Q. And did you know your predecessor with Universal?

A. Mr. Palmer and Mr. Shearer.

Q. Was Mr. Palmer your immediate predecessor or was Mr. Shearer?

A. Mr. Palmer.

Q. Mr. Lowell Palmer?

A. That is right.

Q. And was Mr. Shearer living or dead at the time you came to Universal?

A. He was living.

Q. He has since died, is that right?

A. Yes, that is right, and so has Mr. Palmer.

Q. Mr. Palmer has also?

A. Yes.

Q. Whom are you acquainted with, connected with United States Gypsum?

A. Mr. Avery, Mr. Henning, Mr. Knode, Mr. MacLeish,

Mr. Keady-and many more,

Q. Who were you acquainted with in Beaver?

A. Well, at the time I came into the industry there was no Beaver Company.

Q. Did you know Mr. Blagden?

1408 A. I think I met Mr. Blagden just casually at some time.

Q. When you came into the industry had Universal taken out a license with USG, or rather were they already a licensee of USG at the time you came with them?

A. Yes,

Q. I show you, sir, what has been marked for identification as Government Exhibit 202, the same being a photostat of a memorandum, dated May 18, 1928, addressed to the Executive Committee of Universal Gypsum & Lime Company, and I will ask if you can identify that photostat, sir. Probably the negative photostat, that is the dark one, would be more legible as far as your signature is concerned.

A. Did you want me to read this?

Q. Read it to yourself, to satisfy yourself whether you

can identify it. Can you identify that memorandum, sir?

Q. That is your signature on it?

A. Yes, sir.

Q. And you dictated it, did you?

A. Yes.

Q. Mr. Holland, I direct your attention to the first page; the third paragraph from the bottom, beginning with the word, "negotiation". A. Yes, sir.

Q. What were the competitive conditions in the industry at about that time?

The market on gypsum products was very uncertain, and the products were being sold at a very low price as far as Universal was concerned.

Q. Do you know what the general conditions were in so

far as prices were concerned?

A. Well, I think that that was pretty general. My point was that we couldn't make any money at the prices things were being sold at because of our costs.

Q. Would you say that competition at that time was keen,

or was it not quite so keen?

Mr. Bromley. Objected to as calling for a conclusion.

Mr. KNUFF. Probably it does, but I thought

Justice Stephens (interposing). It is not an objectionable conclusion. You may ask the witness what the character of the competition was, and let him tell it in his own

### By Mr. KNUFF.

Q. What was the character of the competition generally throughout the industry at about the time this memorandum was written, sir?

A. Well, I think it was very live competition, everybody was very active, and it was pretty hard for Universal to

sell anything.

. Q. What type of board were you making at that . time?

A. Closed-edge. 1410

Q. A closed-edge board?

Q. Now you say here that there were negotiations with competitors what did you mean by that paragraph?

A. I don't know unless it would be to shame them out of selling stuff below our costs.

Q. What did you have in mind when you wrote that recommendation, or that memorandum to your Executive Committee

A. I don't know as to anything definite. One of the things was that there had been talk of a merger in the

industry.

Q. Well, how did you expect to end the severe competi-

tive situation that you speak of in that paragraph

A. I don't think I had any very good idea as to that.

Q. Well, you mean that you just put something down on paper without having any reason or rhyme for putting it down?

A. Well, no definite plan, I think that is right.

Q. Well, what indefinite plan did you have, then?

A. Well, I hoped that we could get more for our material.
Q. And how were competitors to contribute towards that?

A. By trying to get more for their material. We were

having to meet low prices always.

Q. You weren't satisfied with your prices, is that correct?

A. That is right.

Q. And neither were you satisfied with the prices of others?

A. No.

Q. By "no", you mean you weren't satisfied, or do you

mean no to my question-which?

A. I mean that the reason that we had to quote such low prices is that we were having to meet low competitive prices in the market.

Q. Well, did you expect your competitors to raise prices?

A. I hoped they would, yes.

Q. You were hopeful of that?

A. That is right.

Q. And what negotiations were you going to pursue towards that end with your competitors?

A. Well, I think that there was some talk in our company, that possibly we ought to have the Government see to it that we could make some profit and not sell stuff below cost.

Q. Well, what did you expect the Government to do, sir?

A. Well, at that time there was a practice, I think, where industries could organize under the Fair Trade Practice laws and come before the Federal Trade Commission.

Q. Were the Fair Trade Practice laws in existence in

the boom period of 1928?

A. I don't know, but at one period in my gypsum experience we did go before the Federal Trade Commission under the Fair Trade Practice laws.

Q. Are you referring to the Federal Trade Commission or are you referring to the Code Authority under the NRA?

A. The Federal Trade Commission.

Q. You are referring to the Federal Trade Commission?

A. Yes, sir, that is right.

Q. And what did you expect your competitors to do along that line?

A. Well, I hoped that they would cooperate.

Q. Did you contact any of your competitors with that in view?

A. Yes.

1413 Q. Whom did you contact?

A. Oh, I think I talked to everybody about it.

Q. Well, that is rather indefinite.

A. I mean all the people that I knew in the industry.

Q. The people that you have just named for me?

Q. The people that you have just named for me?

A. Well, I wouldn't say that I talked to all of them, but I would say that I probably talked to most of them.

Q. Do you recall any conversation that you had with

any of them?

A. No. I don't think I could state definitely just what took place.

Q. Did you have any definite plan that you talked to

them about?

A. Yes. At one of the first conversations, I don't know with whom, I was told that all the companies, or most of the companies, were under an injunction in the Federal Court for the District of New York, which meant that we couldn't even talk about the gypsum business with each other, and in talking to our lawyers about it they stated that a decision had been rendered after this injunction was handed down that probably would modify that, so one of my purposes was to get the injunction modified in order to be able to talk to my competitors without breaking the law.

Q. Do you know the name of that case, sir?

A. No.

1414 Q. What District was it in?

A. I think it was in New York.

Q. The Northern District of New York?
A. I am not sure.

Q. Do you know who the plaintiff was in that case? I am asking you for information because I know nothing about it, and I want to familiarize myself with it.

A. Well, I don't remember. You see, I have been out of

the gypsum industry now for about eight years.

Q. Well, can you tell me the lawyer that you contacted?

A. Yes, I talked to Mr. Sidley of Chicago about it.

Q. Mr. Sidley?

A. Yes.

Q. How do you spell that name, sir?

A. S-i-d-l-e-y.

Q. Is he living today?

A. Yes.

Justice STEPHENS. Of Cutting, Moore & Sidley? The WITNESS. That is right.

# By Mr. KNUFF.

Q. Was that private litigation, sir?

Mr. BROMLEY. I object to that as immaterial, if the

Court please.

Mr. KNUFF. I am trying to get some information about this case. I would like to check into it. I do not have any reason to doubt Mr. Holland's word, but I know

1415 nothing about it.

Justice Stephens. The Court thinks it is proper for you to inquire into it so far as is necessary to show a reason for the witness' conversations, if he had any, or actions, if he took any, which you claim are relevant. if you want to go into the detail of this litigation, and inform yourself about it, I suggest you do it informally

during a recess.

Mr. KNUFF. I simply want the witness to give me the

name of the case and the District.

Justice Stephens. Do you know the name of the case

and the court?

The WITNESS. No, it was before my time. It was merely cited as a reason for not talking industry affairs such as were normal in industry.

## By Mr. KNUFF.

Q. Your best recollection is that it was in the Northern District of New York?

A. That is right.

Q. Is that the only negotiation that you had or that you were going to conduct, rather, with competitors, toward ending the severe competitive situation, or did you have something else in mind, also?

A. Well, our firm, our company, had been exposed to

merger possibilities -

Q. (Interposing.) What do you mean by "exposed to

merger possibilities"?

A. Well, there was a deal on before I came there whereby several of the gypsum companies were to be merged, and some of the bankers that were interested in the Universal Company had taken an active part in trying to throw some companies together, including ours, and some of that effort was still being carried on.

Q. Well, if your company was merged with some other company, then your company would cease to exist, and there would be no reason why you would be interested in

prices after it ceased to exist, would there?

A. No. but it might have been the means of keeping the company from going into receivership.

Q. At that time the company was not in receivership?

A. No.

Q. Are those the only two reasons now that you had to negotiate with competitors towards ending the severe price competition, that is, first, contacting the Federal Govern-ment concerning prices, and second, about this merger that you speak of?

A. Well, that is all I remember.

Q. That is your best recollection as of this time?

A. That is right.

Q. Now, sir, will you look at the next to the last paragraph on Exhibit 202, the first page, beginning "we now have Dr. Nelson", and so forth?

A. Yes, sir. Q. Now what licensing agreements with your

competitors did you have in mind at that time, sir?

A. Well, I don't remember, but I think we only had one license agreement and that was on the closed-edge patent with the United States Gypsum Company, as near as I can remember now.

Q. Well, you say "\* \* which involves license agreements with our competitors and settlements of lawsuits pending." Did you have any lawsuits pending at that time, or did your company have any lawsuits pending at that time?

A. Yes, there was one against the National Gypsum

Company.

Q. And what had the licensing agreements to do with

the settlement of the lawsuit, sir?

A. Well, I think an effort had been made at one time before I was in the company—and I think this probably refers to that—as part of the settlement of the lawsuit against the National Gypsum Company, that they take out a license from Universal on the Universal-owned patents. I think that probably refers to that.

Q. That is, the Universal Company felt that National was infringing certain patents that Universal owned, and you felt that a license agreement should be entered into be-

'tween Universal and National, is that correct? A. That isn't what I said. I said I think there had been an effort along that line before I came into the company.

Q. I misunderstood you, sir.

Now is that all that you had in mind when you wrote' the next to the last paragraph on the first page of Exhibit 202?

A. That is all I can think of now.

Mr. KNUFF. May I have Exhibit 144, please?

Government Exhibit No. 144 was handed to the witness.)

By Mr. KNUFF.

Q. I direct your attention to the second paragraph particularly, beginning with "The attitude of this company", and so forth. Did you know of any license agreement or any proposed license agreement between American Gypsum Company and United States Gypsum Company at that time, or did you know of any negotiations that were on at that time, sir?

A. I don't recollect any, I don't remember.
Q. Do you have knowledge, sir, at about that time, of negotiations concerning a proposed license agreement? Justice STEPHENS. By whom?

Mr. KNUFF. Between various gypsum companies and

The WITNESS. I am sorry but I don't remember.

By Mr. KNUFF.

Q. Do you know of any reason why Mr. Griswold would write this letter to you, sir?

A. Well, at that time I would have liked to have had everybody making closed-edge board, and I think probably, or that you might, have suggested to Mr. Gristo take a license similar to ours with the United States Gypsum Company.

Q. You said that at that time you would have liked to have had every person make closed-edge board, and that you probably, or that you might, have suggested to Mr. Griswold that he take out a license, is that correct?

A. That might be what took place. You asked what

might have occasioned this letter.

Q. Why did you want to see everyone making closed-

edge board?

A. Well, that was a better board. Wallboard generally would get a black eye where it was sold with an open edge. That would be one reason, just a sound business reason.

The open-edge board usually sold for less than the closed-edge board, and yet, as you were meeting competitive prices, you would never know for sure whether you were meeting the price on an open-edge or a closed-edge board, and I thought it would be beneficial to the industry to have people making one kind of board.

Q. When you said you would have liked to have seen everyone take out a license, what did you mean by that?

A. Well, I thought it would be desirable—

Q. (Interposing.) And making a closed-edge board—you thought it would be desirable for every person in the industry to make a closed-edge board?

A. I thought it would be very desirable.

Q. In other words, a closed-edge board would be a desirable thing as an industry proposition.

A. That is right.

Q. Concerning any sales resistance, would closed-edge board eliminate any sales resistance if everybody was making closed-edge board? Would that eliminate any sales resistance in so far as open-edge board was concerned?

A. I don't quite understand the question.

Q. Well, would there be as much competition, sir, if all companies were making the same type board, as between products?

Mr. Bromley. I object to that as speculative and there-

fore incompetent.

Mr. KNUFF. This is just showing his state of mind, your Honor. He said it was his desire, and I am just trying to find out just what he had in mind.

Justice Stephens. I think the question is argumentative.

The objection is sustained.

By Mr. KNUFF.

Q. What protection, sir, were you not getting, that is

referred to in Mr. Griswold's letter?

1421 A. I don't know.

Q. Had you ever complained to USG?

A. I don't remember that I had.

Q. You will note in the letter it says, "Mr. Avery has gone on record that he will not make any change", and so

forth. Do you know what that referred to?

A. No, unless it referred to—it could refer to the fact that in considering any new licenses in the industry, I think the United States Gypsum Company had taken the position that they would not grant a more favorable license to one company than to another.

Mr. Bromley. I think the whole sentence ought to be read, if the Court please. It is perfectly obvious what it means if you read the whole sentence. Of course it isn't

if you stop in the middle.

Mr. Knuff. I haven't any objection to reading the whole sentence. I just didn't want to have the Court feel that I was trying to put something into the record indirectly that the Court suggested I couldn't get into the record.

Justice STEPHENS. Read the whole sentence. Mr. KNUFF. The whole sentence reads, sir:

"If they will amend the agreement to give their licensees some protection and consideration for the money they get paid, I am inclined to think our people would consider the proposition, but so far Mr. Avery has gone on record that

he will not make any change and there is not much 1422 chance of this Company being interested in his

agreement."

Justice STEPHENS. What is the question?

Mr. Knuff. What is the question, Mr. Reporter, please?
(The reporter read the previous question and answer.)
Justice Stephens. Do you want your answer to stand now as to the whole sentence?

The WITNESS. Yes, I think that is all right.

## By Mr. KNUFF.

Q. I direct your attention, sir, to the last sentence of the third paragraph beginning, "I believe the National", and so forth. What was your information as to whether or not National was considering entering into a license agreement with USG at that time?

A. I don't know.

Q. My question is, sir, what was your information—and your answer is, "I don't know". It is hardly intelligible.

A. All right.

Q. I am not criticizing your English, I am just trying to get the question answered.

A. I don't know that I had any knowledge on that. Does

that answer it?

Q. You didn't have any knowledge?

A. I don't know that I had any, I don't remember having any knowledge—I don't remember of any knowledge that I had on that.

Q. You don't recall whether or not you knew at that time that National might have been contemplating entering into a licensing agreement with USG, is that correct?

A. That is right.

Mr. KNUFF. May I have Exhibit 145, please?

(Government Exhibit No. 145 was handed to the witness.)

#### By Mr. KNUFF.

Q. That is a carbon copy of a letter written by you to Mr. F. J. Griswold, is it not?

A. Yes, evidently.

Q. And it answers Mr. Griswold's letter of September 10, Exhibit 144, isn't that correct?

A. Yes, evidently.

Q. Now I direct your attention, sir, to the second paragraph of that letter beginning, "I think Mr. Haggerty and others interested", and so forth.

In view of the contents of that paragraph would you care to change your answer as to what your information was as to whether or not National was contemplating tak-

ing out a license with USG?

A. Well, that would indicate that there had been some conversation on it that I didn't recall when I answered your former question.

1424 Q. So apparently you knew at that time, sir, that National was contemplating some licensing agreement with USG, is that correct?

A. Well, this would indicate that there had been some

discussion of that.

Q. Now referring to the second sentence in the first paragraph, "I wish you would give me definite information", and so forth—what did you want that information for, sir?

A. Well, I was interested in everybody's ideas of what a good license agreement should be. I was trying to learn

everything I could about the gypsum business, being an en-

tire newcomer in it.

Q. And you said, "I would not expect to use this information received from you other than as a background in approaching this whole situation when the proper time comes". What did you have in mind there as to a "proper time"?

A. Well, I had hopes that some day these men would all sign the closed-edge license agreement, or a closed-edge

license agreement.

Q. You did have those hopes, is that correct? A. That is right.

Q. And what did you do, if you did anything, to bring about a realization of those hopes?

A. Do you mean at this time?

Q. Yes, approximately at this time.

A. Well, I don't remember anything concrete.

Q. Did you talk to other gypsum-board manufacturers?

A. Oh, I suppose I did.

Q. Can you recollect any that you talked to? I realize,

of course, that memory is sometimes faulty.

A. No, I couldn't be specific. I visited with everybody in the industry and tried to pump them for all the information I could get on everything, every phase of the business. I probably talked to all of them at different times.

Mr. KNUFF. May I have Exhibit 146, please?

(Government Exhibit No. 146 was handed to the witness.)

## By Mr. KNUFF.

Q. I refer you particularly, sir, to the first paragraph of the letter, Exhibit 146, in which Mr. Griswold says, "\* that there is not much use of your spending much time on the proposition," and so forth. What "proposition" did he have reference to, if you know?

A. Where does it say that?

Q. Well, let's see if you have the same exhibit that I have, possibly you might have a different exhibit. No, you have the same exhibit.

Justice Stephens. It is in lines 7 and 8.

The WITNESS. I don't know, I don't remember what might be referred to there except that I was pretty desperate as far as our company was concerned.

1426 By Mr. KNUFF.

Q. Well, you will notice, sir, that he mentions a "proposition" in the same sentence, with the United States. Gypsum Company. Now does that kindle the embers of your recollection any?

A. No, it does not.

Q. Were you engaged in any proposition of an industry nature in which USG was also interested, and which American Gypsum Company apparently was interested in?

A. Well, outside of being in the gypsum business I don't think so. I didn't pay much attention to this man Griswold. He was kind of discredited by some of our own group.

Q. Will you keep your voice up, I can hardly hear you,

and I am sure the Court can't?

A. Some of our Directors didn't think much of Mr. Griswold as representing his company or anything else. I think they had had some dealings with him. So I didn't take him very seriously.

Q. I see. Now will you notice the last paragraph of the

letter, Mr. Holland, please.

A. Yes, sir.

Q. What license agreement was referred to there in the language "While we may not be in line with the license agreement," and so forth.

1427 A. I wouldn't know unless it was the closed-edge license agreement Universal had with the United

States Gypsum Company.

Q. Now you will notice, Mr. Holland, that Mr. Griswold makes reference to certain market conditions in his letter. Were the conditions at that time, that is market conditions, the same as they were in May, 1928, when you dictated Exhibit 202?

A. Yes, I think so.

Q. Did you have a demoralized price situation in the industry at that time?

A. As I remember it, yes.

Q. And how could United States Gypsum correct those market conditions?

Mr. OLIVER. I object to that question as calling for an opinion—how could United States Gypsum correct it?

Mr. KNUFF. I think it is not an opinion—if he knows.

If he doesn't know, he can say, "I don't know."

Justice STEPHENS. It seems to the Court that it is asking for his opinion on the subject. Not every opinion of course is an objectionable conclusion, but that seems to be

really speculative, Mr. Knuff. Perhaps you can rephrase your question in order to bring out what you had in mind.

Mr. KNUFF. All right, I will try to do so.

Justice Stephens. Ask him what he expected United States Gypsum Company to do, if anything.

1428 By Mr. Knuff.

Q. What, if anything, did you expect the United States Company to do in order to bring about better market conditions?

A. Well, I didn't write that letter.

Q. I realize that.

A. Well, I think that if the United States Gypsum Company would raise the prices of their products, it was such a big factor in the industry that it probably would mean that the rest of us would have se se enough to get more for our products.

Mr. KNUFF. I notice that it is just about four o'clock,

and I am going to start on another subject.

Justice STEPHENS. All right. I think all exhibits have been ruled upon up to 201, have they not? You have not

offered 202, have you?

Mr. KNUFF. I thank you for calling that to my attention. I now offer in evidence Government's Exhibit 202, the same being a photostat of a memorandum dated May 18, 1928, addressed to the Executive Committee of Universal Gypsum & Lime Co., and signed by Eugene Holland.

Justice STEPHENS. Is there any objection, except the

usual objection?

Mr. BROMLEY. No. sir.

Justice STEPHENS. It may be offered in evidence subject to the usual reservation which the Court has made with respect to this class of evidence.

(The document marked Government Exhibit No.

202 was received in evidence.)

Justice STEPHENS. Announce a recess until tomorrow morning at ten.

(Thereupon, at 4:00 o'clock p.m., an adjournment was taken to 10:00 o'clock a.m., Wednesday, December 1, 1943.)

1430 IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

## · United States of America, Plaintiff

V.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

WASHINGTON, D. C., WEDNESDAY, DECEMBER 1 1943.

The above-entitled cause came on for further hearing at 11:40 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)
Thereupon, EUGENE HOLLAND, the witness on the stand at the time of adjournment, resumed his testi-

mony as follows:

DIRECT EXAMINATION (resumed).

Mr. Knuff. May it please the Court, pursuant to the notice by Mr. Bromley yesterday to produce the letter of September 29, I made a search of the files last night and I am unable to leeste the letter and in addition to that, I have no recollection of ever seeing the letter.

Justice STEPHENS. Thank you for looking for it, Mr.

Knuff.

1434

Mr. Bromley. I can only say that it was submitted, under subpoena, by USG.

Mr. KNUFF. I have no doubt that it was submitted, but

I just say I can't locate it.

Justice STEPHENS. You have established the foundation for secondary evidence, I assume, if you wish to use it, Mr. Bromley.

Mr. BROMLEY. Yes, sir.

The same

Mr. KNUFF. May I have Exhibit 145, please? (Exhibit No. 145 handed to the witness.)

#### By Mr. KNUFF.

Q. Mr. Holland, yesterday I referred to Exhibit 145,

and I asked you this question:

"Now referring to the second sentence in the first paragraph, 'I wish you would give me definite information', and so forth-what did you want that in-

1436 formation for, sir?"

I am quoting from page 1721, gentlemen.

And your answer to that was:

"Well. I was interested in everybody's ideas of what a good license agreement should be. I was trying to learn everything I could about the gypsum business, being an entire newcomer in it."

Do you recall that, sir?

A. Yes, sir. Q. Now will you please refer to the exhibit again, and in the 5th line, the 4th word in, you will notice that you use the demonstrative pronoun "this" rather than the article "a". Does that indicate to you anything, sir?

Justice STEPHENS. Which line is that?

Mr. Knuff. The 5th line down, the fourth word in-"your idea of this".

Justice STEPHENS. I see, thank you.

The WITNESS. I don't remember, but I would think, in reading the whole paragraph, that it probably referred to his idea of a modified license agreement on closed-edge wallboard.

#### By Mr. KNUFF.

Q. A modified license agreement on what, sir?

A. On closed-edge wallboard.

Q. And why were you asking Mr. Griswold for his idea as to a modified license agreement?

1437 A. Well, I don't remember except as I recollect, or as I am guided by this letter, that he had stated that possibly his company could be interested in a modified license agreement.

Q. You say you think that he had stated that his company might be interested in a modified license agreement. Do you have any recollection of whether or not that is

correct?

A. No, except the reference to it here.

Q. And is that your best recollection now, as refreshed by this exhibit, sir?

A. I think so.

Q. Now, Mr. Holland, I want you to look at the first sentence of the second paragraph: "I think Mr. Haggerty and others interested are still of the opinion that some time in the near future I should attempt to arrange a meeting". Do you notice that, sir?

A. Yes, sir.

Q. When you said, "I think Mr. Haggerty and others are interested", what did you base that assertion on, sir?

Mr. Bromley. I think you misspoke yourself. The letter says, "and others interested", not "and others are

interested".

Mr. KNUFF. Yes, "and others interested". Do you understand my question?

The WITNESS. Yes. I don't remember.

1438 By Mr. KNUFF.

Q. Did you have any basis on which to predicate that assertion?

A. I don't remember of anything definite. As I circulated around, I got different impressions of what different people were thinking.

Q. And from those impressions you gathered the con-

sensus of opinion in the industry, is that correct?

A. I wouldn't go that far, as to the whole industry. I think I gained impressions of what different managements of different companies were thinking.

Q. When you say "and others interested," to whom are

you referring, sir?

A. I do not remember specifically.

Q. Well, what is your best judgment, what is your best recollection, sir?

A. I don't believe I could state anybody in particular.

Q. Would you say it had reference to Atlantic Gypsum?

A. No, I couldn't say that definitely.

Q. I direct your attention, sir, to the fact that at the time this letter was written on September 13, 1928, there were four licensees of USG: first, Beaver; second, Universal; third, Atlantic; and fourth, Texas. Now does the

word "others" refer to any one of those four?

1439 A. I do not remember.

Q. What other companies, sir, were manufacturing board, other than the four I have named?

A. Well, Ebsary Gypsum Company.

Q. Ebsary is one?

A. I don't know for sure whether Atlantic was at that.

- Q. Atlantic was a licensee at that time.
- A. Oh, they were a licensee.
- Q. Well, was American?

A. Yes. .

Q. And was National?

A. Yes.

Q. And was Certain-teed?

A. Yes.

Q. Now with that information, can you tell us what the words "and others" referred to, who they referred to?

A. Not specifically, I couldn't.

Q. You can't?

A. I don't remember, no, sir.

Q. You will notice also in that sentence the expression, "I should attempt to arrange a meeting." Do you notice that?

A. Yes, sir.

Q. Now what kind of a meeting did you have in mind, sir?

1440 Q. I don't remember.

A. Was it a meeting of persons interested in the gypsum board business?

A. I am sorry, but I wouldn't attempt to state.

Q. Well, could it be anything else but that, sir?

Mr. Bromley. I object to that on the ground it is specu-

lative.

Justice STEPHENS. It seems to the Court argumentative, that you are asking the witness for his inference as to what it must have been, and that is a matter which, of course, you can argue from the exhibit itself.

The objection is sustained.

Mr. KNUFF. I realized that it was skating pretty close when I asked him.

By Mr. KNUFF.

Q. And your best thought now is that you haven't any recollection of what kind of a meeting it was?

A. That is right.

Q. Did you have in mind who was going to attend that meeting?

A. I don't remember now.

Q. You don't?

A. No, sir.

Q. Now, then, I direct your attention further to that same paragraph, and I call your attention to the lan-

guage, "that some time in the near future I should 1441 attempt to arrange a meeting; in order to be in a position to intelligently handle the situation.". Do you notice that, sir?

A. Yes, sir.

Q. What situation did you have in mind?

A. I honestly couldn't tell you.

Q. You haven't any present recollection of what you actually had in mind, is that correct?

A. No, I wouldn't be sure, it is too long ago.

Q. Well, Mr. Holland, would you say that you had some purpose in writing this second paragraph in the letter?

A. Undoubtedly.

Q. But what your purpose was presently escapes your recollection?

A. That is right.

Q. You will notice further that you state that you "should have a very definite idea from everyone in

volved". Now whom did you mean by "everyone involved"?

A. I don't remember definitely. I would assume from the wording that it would mean wallboard manufacturers.

Q. You meant by that that you should have a definite idea from all the wallboard manufacturers, is that correct?

A. Well, that is an assumption on my part now.

Q. Well, is that your best recollection now?

A. No, it is not a recollection; it is an assumption, after reading this, that that might have been the case.

Q. Do you have any recollection at the present time?

A. No, I don't, I am sorry.

Q. Do you have any recollection at the present time as to what you hoped to accomplish at this meeting, as you said in the letter?

A. Not from a memory standpoint.

Q. Well, from any standpoint?

A. If I could discover something wrong with our license agreement I might have made some attempt to change it, to get it changed.

Q. Well, bear in mind, sir, that you were writing to Mr.

Griswold.

A. That is right.

Q. And he was connected with American.

1443 A. That is right.

Q. And American was not a licensee at this time. Did you expect Mr. Griswold to point out some defects in your license agreement?

A. I take it from that letter that that was one of the things.

Q. And did you know that Mr. Griswold knew of your

license agreement?

A. I don't know that I did; I think it was pretty generally known the type of agreement that was in the industry.

Q. When you say that it was pretty generally known,

what do you mean by the indefinite pronoun "it"?

A. The type of contract.

Q. You say that it is your present recollection now that the industry knew that USG had made license agreements with the other four manufacturers?

A. I wouldn't want to say that I recollect that it was;

I would say that I now assume that it was.

Q. You haven't any present recollection?

A. No, sir.

Q. What do you base that assumption on?

A. Well, everybody in the industry that was interested, through financial circles and all, had a pretty good opportunity to know the basis of operations of the respective companies, and what contracts they had. A lot of it was based on gossip, of course.

1444 Q. Pardon me?

A. Some of it was probably based on gossip; but I would assume that practically everybody knew that there was such a license agreement.

Q. Do you have any present recollection of anyone that didn't know that the USG had licensed Beaver, Universal,

Texas and Atlantic?

A. No, I have no recollection.

Mr. KNUFF. May I have Exhibit 147, please?

(Government Exhibit No. 147 was handed to the witness)

The WITNESS. Yes, sir, I have read it.

By Mr. KNUFF.

Q. Exhibit 147 has been identified by Mr. Griswold as a copy of a letter that he received from you. Do you recognize the letter?

A. Yes, sir.

Q. It is a copy of your letter?

A. I believe so.

Q. Now I call your attention, sir, to the first line in the first paragraph which reads, "I am afraid that nothing can be done towards stabilization" and so forth. What did you

mean by "stabilization"?

A. Well, I don't know for sure what I meant at that time. I would assume that it had reference to the hope that the downward spiral of prices in the gypsum

1445 industry would stop.

Q. You what, sir? Justice Stephens. Read the answer, Mr. Reporter. (The reporter read the preceding answer.)

By Mr. KNUFF.

Q. Will you define "stabilization" for me, sir? Mr. Bromley. I object to that as immaterial.

Justice STEPHENS. Well, it is a form of asking the witness what he means by the term. I think it is technically not material. We could subpoen the dictionary, I suppose. But the Court will overrule the objection.

What do you mean by using that word, when you ordi-

narily use it yourself, Mr. Holland?

The WITNESS. Well, Your Honor, I don't know that I am very clear on that word. I think it is one of those vague words as to meaning. In ordinary commerce I think the word "stabilization" is often thought of as a situation where prices reach a certain level and stay there.

Justice STEPHENS. What the Court, and apparently counsel, are interested in, of course, is what you meant by

that word in your letter, if you know now.

The WITNESS. At that time the market changed from one day to another, and no one knew, even the buyers didn't know what they were expected to pay, or what they were going to pay, and it was a very disastrous affair

1446 and a very difficult one to work with.

### By Mr. KNUFF.

Q. Well, what were you afraid of when you say in that letter, "I am afraid that nothing can be done towards stabilization until the board matter is entirely out of the way".

A. I was afraid that they would continue down below our cost of production, and we would be out of business

and lose the stockholders a lot of money.

Q. What did you mean by the expression "board mat-

A. I am not sure but it was probably the litigation in

the industry.

Q. " \* until the board matter is entirely out of the way"-and your recollection is that that referred to litigation?

A. Well, I am not sure about that, but I say that it might have been that.

Q. Well, how was disposing of the "board matter" re-

lated to stabilization?

A. Well, I am not sure that it was.

Q. Well, you state in your letter, "I am afraid that nothing can be done towards stabilization until the board matter is entirely out of the way."

A. Well, that is where my memory fails me.

Q. Well, did the board litigation that was then going on—as you have said "board matter" referred to—

1447 did that stand in the way of stabilization?

A. I don't know, I couldn't say that it did; it might have been my impression that it could have been

affected by that.

Q. You had something definite in mind when you related "board matter" to "stabilization". Now I want you to tell me what you had in mind? I realize of course, sir, that this is back some years and I just want your best recollection?

A. Well, the only thing I can think of now is that we were contemplating having the injunction modified whereby the people in the gypsum industry would feel that they could legally discuss matters with each other, possibly leading up to the Federal Trade Commission effort that we made, on Fair Practice, and so forth.

Q. Did Mr. Griswold know anything about that injunc-

tion matter?

A. I don't know, but I believe his company was under injunction.

Q. Well, if he didn't know anything about the matter would you write such a sentence as you did to him?

A. I don't know, I can't remember.

Q. It is your present recollection that the American Gypsum Company was under some form of injunction at that time?

A. It is my present impression that they were.

Q. And that is the injunction that you spoke of

yesterday?

A. Yes, sir. Q. In New York State some place?

A. That is right.

Q. And with that injunction out of the way how were you going to stabilize prices?

A. I don't know that we were.

Q. Well, I take it, sir, that you do not write useless

letters. Now what did you have in mind in the way of stabilizing prices if you could get the injunction out of the

way?

A. Well, I think with the injunction out of the way— I think one of the ideas of that was that some of us could get together to prepare to go before the Federal Trade Commission to see if some way could be worked out, some plan could be accomplished, whereby we would not be selling our products below the cost of production.

Q. Did you think that you could go before the Federal Trade Commission and have the Federal Trade Commission authorize your company and other companies to agree

upon prices?

A. I don't believe so.

Q. You say you don't believe that you could do that?

A. No.

Q. Then if you didn't believe that you could do that, why were you going to go before the Federal Trade Commission, sir?

1449 A. As I stated before, to provide some relief from marketing stuff below cost or near cost of produc-

tion.

Q. Well, you knew, if I understand you correctly, sir, that the Federal Trade Commission couldn't authorize any such sort of procedure as you had in mind. Now do you still want this Court to understand that you were going before the Federal Trade Commission on a useless mission?

Mr. Bromley. He didn't say that, if the Court pleases. Of course the Federal Trade Commission could authorize just what he had in mind, that is, could approve rules adopted by an industry providing that they shouldn't sell

below cost.

Mr. Knuff. That is a new way to modify the Sherman Antitrust Act and I would ask Mr. Bromley to give me some

authority on that?

Mr. Bromley. When it comes my turn to examine, if ever, I will produce the rules approved by the Federal Trade Commission.

Justice Stephens. The question does incorrectly assume that the witness said he would do a useless thing, and the

objection is sustained.

Mr. KNUFF. I am only saying what the witness said. He said he didn't believe that the Federal Trade Commission could authorize that. Now here we are examining into the state of mind of this witness; I am not cross-examining

him, I am trying to ascertain what his state of mind was. His answer to me was that he didn't believe the Federal Trade Commission could authorize the thing that he was going to take up with them. Now I ask him if he felt that he could go before the Federal Trade Commission and ask the Federal Trade Commission to do a useless thing.

Mr. Bromley. That doesn't correctly represent his tes-

timony.

Mr. KNUFF. Let's appeal to the record, please.

Mr. Bromley. Let me state my view of it first, and see if you won't agree. All he said was that he didn't believe the Federal Trade Commission could authorize his company and the other companies to agree on prices. But he didn't mean to say, and,he didn't say, that he didn't believe that the Federal Trade Commission could approve industry

rules which would prohibit sales below cost.

Justice Stephens. The Court thinks no more discussion is necessary. The Court, by its ruling, does not intend to stop your examination of the witness. You are entitled to proceed and try to find out, if he has a recollection, what he knows, what his purposes were in writing these letters, and what his purposes were in going before the Federal Trade Commission, if he did that; but the particular question asked I think did incorrectly assume a statement which the witness has not made. That was the only reason for the ruling sustaining the objection.

1451 But you may proceed with the examination after

the recess.

(Whereupon, at 12:20 o'clock p.m., the hearing was recessed until 1:45 o'clock p.m., of the same day.)

1452

## AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p. m., pursuant to recess.)

Justice STEPHENS. Proceed with the examination.
Thereupon, EUGENE HOLLAND, the witness on the stand at the time of recess, resumed his testimony as follows:

DIRECT EXAMINATION (resumed) by Mr. KNUFF.

Q. Just before the noon recess, Mr. Holland, we were looking at Exhibit 147. Just before we adjourned I was directing your attention to the first sentence, and if my

memory serves me correctly you said that by "board matters" you meant this litigation that was going on in the industry at the time; is that correct?

A. I didn't say it that way.

Q. Well, I don't mean to misquote you. Would you mind stating what you then meant by "board matter", please?

A. Well, I think my testimony was to the effect that I did not remember exactly what that "board matter" was; and I think I added further that on reading the letter, that it might have been the ending of the litigation on the board cases.

Q. I direct your attention to the second sentence, which reads, "I believe that Mr. Avery has been very definite in a statement to that effect." Do you

see that, sir?

A. Yes, sir. Q. What do you base your belief on, sir?

A. You mean what did I at that time?

Q. Yes, sir.

A. I don't believe I remember it.

Q. Will you state whether, Mr. Avery had made that statement to you?

A. I don't remember that he did.

Q. Did you have any basis for making the statement that you made in your letter there? The statement that you say Mr. Avery has been very definite on was that "nothing can be done towards stabilization until the board matter is entirely out of the way."

A. I don't remember. There must have been some talk to that effect around the industry, but I don't remember

now.

Q. Well, I don't want you to think, Mr. Holland, that my next question implies any reflection upon you, or casts any aspersions, because I don't mean it that way. Did you write truthful letters?

A. To the best of my ability, yes.

Q. And was that statement that you wrote there correct, at the time.

A. I don't believe I would have written a thing like that unless I had heard something to that effect.

Q. But at the present time you can not enlighten us as to what you based that statement on?

A. No, sir.

Q. Now you will notice in the next sentence, "Inasmuch as Certain-teed, National, and others are unwilling to negotiate any on the board proposition until your decision

is clearly defined, it would seem that the entire matter rests with your decision." Do you see that, sir?

A. Yes, sir.

Q. Now at that time, did you have any knowledge that Certain-teed and National were unwilling to negotiate?

A. I would think that I did, having read this now.

Q. And what were they going to negotiate for, sir, a license agreement?

A. I don't distinctly remember that, but I would assume

so from reading this now.

Q. Now you will notice that the date of that letter is September 20, 1928, and you will notice, sir, that the date of the letter which is Exhibit 144—will you show the witness Exhibit 144, please—was just 10 days previous, or on September 10, 1928. Do you notice that?

A. Yes, sir.

Q. Now I want to call your attention, sir, to something that you said yesterday on page 1715 of the transcript. I there said to you:

"I direct your attention to the second paragraph"

—at that time I was referring to Exhibit 144—
"particularly, beginning with 'The attitude of this company', and so forth. Did you know of any license agreement or any proposed license agreement between American Gypsum Company and United States Gypsum Company at that time, or did you know of any negotiations that were on at that time, sir?"

Your answer to that was:

"I don't recollect any, I don't remember."

My next question was:

"Do you have knowledge, sir, at about that time, of negotiations concerning a proposed license agreement?"

Justice Stephens said:

"Between whom?"

I then said:

"Between various gypsum companies and USG."

And your answer was:

"I am sorry but I don't remember."

Now in view of your letter of the 20th of September and your answers here today, do you care to change that former testimony, sir?

A. No, sir.

Q. Why did you want Mr. Griswold to clearly define his decision, as you state in Exhibit 147?

A. I don't remember definitely, but reading this today I think that I would be interested in everyone's

idea as to the proper kind of a license arrangement.

Q. At that time your company was a licensee?

A. That is right.
Q. Then you say further: "\* \* it would seem that the entire matter rests with your decision."

Now what matter rested with Mr. Griswold's decision?

A. Well, again, I don't remember. Taking that sentence today, it would indicate whether Certain-teed or National took out a license.

Q. That would depend upon the American Gypsum Com-

pany's decision, is that what you mean?

A. That is the way I would interpret that now, but it

is not from memory.

Q. Now I direct your attention, sir, to the second paragraph of that letter, where you said: "\* \* several of us have thought that maybe we could get farther by having a meeting of several representatives of firms who are involved in the board situation."

Do you see that sentence?

Justice Jackson. If you will indicate the number of that exhibit it will be clearer in the record.

Mr. KNUFF. Thank you, Your Honor. That is taken from Exhibit 147.

1457 By Mr. KNUFF.

Q. Whom did you mean by "several of us have thought"?

A. I don't remember.

Q. Well, had you had any conversation with any person else in the industry, about that time, concerning the subject matter of this letter, if you recollect, of course?

A. I don't remember.

Q. Why did you think that "we could get farther by having a meeting of several representatives of firms who are involved in the board situation"?

A. Well, an exchange of ideas, I imagine, was behind

that thought.

Q. You thought that a meeting of representatives would be conducive to promoting the license agreement, is that what you mean?

A. I am not sure what I meant by that; at that time. know that I was active in getting an exchange of ideas in the industry on industry problems.

Q. Yes, but did you have in mind at that time an indus-

try-wide licensing agreement?

A. Why, I think I hoped for a thing like that, yes.

Q. And would you say that that is what you had in mind?

A. I don't remember that it was in that instance.

Q. You say now that at that time you had hoped for that?

1458 A. Yes, I hoped for it right along, as I testified

a while ago.

Q. Do you recall, sir, whether or not you received a reply from Mr. Griswold to this letter?

A. No, sir.

Q. On page 1719 of the testimony of yesterday, I direct

your attention to the following question and answer:

"Q. I direct your attention, sir, to the last sentence of the third paragraph beginning, 'I believe the National', and so forth. What was your information as to whether or not National was considering entering into a license agreement with USG at that time?"

And your answer to that was:

"I don't know."

Justice STEPHENS. What exhibit did that concern, Mr. Knuff?

Mr. Knuff. It was Exhibit 144.

By Mr. KNUFF.

Q. Did you understand my question, sir?

A. No, sir.

Q. Suppose I read it to you again, or have the reporter read it.

(The record was read by the reporter.)

By Mr. KNUFF.

Q. Now in view of what you have set forth in Exhibit 147, do you care to make any change in that answer?

A. I am a little bit confused. I don't quite get

the connection.

Justice STEPHENS. The Court thinks the witness may be confused because as the question was asked on page 1719, he apparently had not the exhibit in front of him.

The WITNESS. I have Exhibit 144 before me now.

Justice STEPHENS. As I understand it, what you are being asked is this: You testified, apparently, at page 1719, in respect to the last sentence in the next to the last paragraph of Exhibit 144, which reads:

"I believe the National would consider the agreement providing they would have some guarantee as to what action the Gypsum Company is going to take."

And your attention being directed to that sentence, you were asked, "What was your information as to whether or not National was considering entering into a license agreement with USG at that time?"

And your answer was: "I don't know."

Now Mr. Knuff apparently wishes to know, if I understand him correctly, whether you would alter that answer, in view of what you have stated today.

Mr. KNUFF. That is right.

The WITNESS. Isn't that the same question I answered a while ago?

1460 Mr. KNUFF. No, it isn't.

Justice Jackson. I am confused, Mr. Knuff, frankly. Do you mean does he want to change his testimony in view of what he has seen here in Exhibit 147?

Mr. KNUFF. That is what I am asking him, sir. In view of Exhibit 147, and his answers on that exhibit, I called his attention to and gave him an opportunity to change his answer if he cared to, because National and Certain-teed are definitely mentioned in Exhibit 147.

Justice Jackson. Well, possibly the witness may un-

\*derstand it more clearly now.

Justice Stephens. If you don't understand it, you are not required to answer, and you may take such time as is necessary to clear up your own mind about the question.

The WITNESS. Well, if I understand correctly, my answer

would be no.

## By Mr. KNUFF.

Q. And you want to let your answer stand?

A. Yes, sir.

Q. All right, sir.

A. But I admit that I am a little uncertain on the route

of your questioning.

Q. Well, if you can tell me where your uncertainty exists, I will try to clear it up. I don't mean to confuse you, Mr. Holland.

Justice Stephens. Let me suggest this to you,

Mr. Knuff, if you care to do so, that you point out a little more definitely what you think—I assume you think there is an inconsistency between the questions and answers yesterday and the questions and answers today. If you can point that out to the witness and call specifically to his attention the apparent inconsistency, if you think that that is what it is, then perhaps he can be clear about it. I am not entirely clear myself.

Mr. KNUFF. Very well. Then the fault is apparently on my part, and I will try to correct it.

Justice STEPHENS. Not at all. Perhaps the subject matter is complicated.

Mr. JOHNSTON. May I interrupt, if the Court please?

Mr. Johnston. In listening to the testimony of this witness, from his answers I got the impression that he had no personal recollection, and therefore answered no, and that looking at these exhibits didn't change his opinion as to his personal recollection.

Now these letters may indicate something else, but still his personal recollection is the same as it was. Now am I

right or wrong about that?

Justice STEPHENS. Yes.

Justice STEPHENS. You may ask the witness.

Is your personal recollection today just what is was yesterday?

The WITNESS. Yes, sir.

Justice STEPHENS. However, I think it is not improper for Mr. Knuff to point out an apparent inconsistency which the witness may be given an opportunity to explain, if he can.

Mr. KNUFF. May I show the witness his testimony?

Justice STEPHENS. Yes, you may.

(Transcript of testimony handed to the witness.)

# By Mr. KNUFF.

Q. Now, sir, in Exhibit 147, in the first paragraph, you mention both National and Certain-teed. Now my question is—do you care to change your answer as of yesterday when you said, "I don't know."?

A. My answer would be no. And if a witness is entitled to, I think maybe I might clear this thing up, if I am being

accused of being inconsistent.

Q. No, I am not accusing you of being inconsistent.

Justice STEPHENS. You may clear it up.

The WITNESS. This is not from memory, again, but the information that Mr. Griswold gave me in the letter—
Justice STEPHENS (interposing). Which letter?

The WITNESS. Exhibit 144. (Continuing.)—to the effect that National might be interested, might have attracted my attention enough to have found out, by the time

I wrote my September 20 letter, that they might

1463 be interested.

## By Mr. KNUFF.

Q. Then state whether or not, at some time in September, 1928, you did find out that National was interested in entering into a license agreement with USG?

A. I am not sure. This is again not from memory, but

the letter would indicate that I had found out.

Q. I think that clears it up very well, Mr. Holland.

Mr. KNUFF. Unfortunately, when I passed the exhibits up to the Court yesterday, I inadvertently left out an exhibit that was in another file at the time. I caught it last night, and would like to have the Clerk hand these to the

Justice Jackson. Was that in the second batch that you

handed up vesterday?

Mr. KNUFF. The batch that I handed up yesterday, beginning with 202.

Justice GARRETT. You introduced 202.

Mr. KNUFF. That is right.

Justice GARRETT. That is the last one that you introduced.

Mr. KNUFF. Yes, sir.

This should be introduced into Your Honors' series of exhibits immediately following the May 18, 1928, memorandum.

Justice Stephens. You mean the memorandum which

Mr. Blagden -

Mr. KNUFF (interposing). No, Your Honor, the first memorandum that Mr. Holland identified yesterday, which is Exhibit 202. And this should be marked Exhibit 203 for Identification.

Justice Stephens. Very well.

Justice GARRETT. I beg your pardon, now, Mr. Knuff. That confuses me a bit. Exhibit 202, which was introduced yesterday, is not a memorandum, it is a letter.

Justice STEPHENS. It is a letter to the Executive Committee of the Universal Gypsum & Lime Company, and Mr. Knuff is apparently describing it as a memorandum. Mr. KNUFF. Yes, I am referring to it as a memorandum

rather than as a letter.

Justice STEPHENS. Now this one of October 11, 1928, is to be marked for Identification as Exhibit 203, is it?

Mr. KNUFF. I am just going to have it marked. I ask that there be marked for Identification at this time . as Government's Exhibit 203, a letter dated October 11, 1928, addressed to Mr. John A. Kling, and signed by Arthur R. Black.

Justice Stephens. It may be marked for Identification as Government's Exhibit 203.

Mr. KNUFF. Just for Identification at this time.

(The letter referred to was marked as Government's Exhibit 203 for Identification.)

1465 (Government's Exhibit 203 handed to the Witness.)

By Mr. KNUFF.

Q. Will you please read that letter of October 11, 1928, Mr. Holland?

A. Yes, sir.

Justice Stephens. Just a moment, please, let me finish. Mr. Knuff. Yes, Your Honor.
Justice Stephens. Proceed.

By Mr. KNUFF.

Q. Did you attend such a conference in New York as

described in this exhibit, sir?

Mr. ADAMS. I object to that use of the exhibit, Your Honor. It hasn't been identified as anything. It seems to me that at most he can ask him if it refreshes his recollection.

Justice Stephens. Well, the exhibit isn't offered in evi-

dence yet, it isn't in evidence.

Mr. KNUFF. It isn't in evidence because we haven't Arthur Black here yet, and I am not going to offer it in evidence until Mr. Black is here to identify it. We have

Mr. Black subpoenaed.

Justice STEPHENS. Well, I think Mr. Adams' suggestion, in the form of an objection, is a good suggestion. As the record now stands, the question won't mean anything in the record, because this exhibit not being in the record

now, the record won't show what the examination 1466 is about. Why don't you just state, "I call your at-

tention to the fact that in this proposed Exhibit 203, reference is made to a meeting in New York at such-and-such a time. You have read that letter. Now did you attend such a meeting?"

Mr. KNUFF. I think that was the purport of my question.

I may be wrong,

Justice STEPHENS. I didn't so understand it. Maybe the witness did.

Mr. KNUFF. Would you read the Judge's question, please, to the witness?

(The question was read by the reporter.)

Justice STEPHENS. I was phrasing that question only in

general terms for the aid of counsel. You may refer to the particular time, if you wish to, to make it more definite in the record. Ask your own questions, Mr. Knuff.

Mr. KNUFF. I think the witness knows what we have in

mind.

Justice STEPHENS. Yes, but the record ought to show what you are asking him about. When was this meeting in New York? I don't want to conduct your examination. I wish you would reask your question and refer more definitely to the New York meeting.

Mr. KNUFF. Very well, Your Honor.

By Mr. KNUFF.

1467 Q. You have read Exhibit 203, is that correct, sir?

A. Yes. sir.

Q. And the letter is dated October 11, 1928, is that correct?

A. Yes, sir.

Mr. Adams. I respectfully object to this procedure. Mr. Knuff, and with all due deference also the Court, are referring to this as a letter. It isn't anything, it is a piece of paper, and hasn't been identified by anybody as anything.

Secondly, the witness has not been asked whether he has any present recollection about the meeting. He hasn't been asked if he needs to have his recollection refreshed, nor has he been asked whether, if he needs to have it refreshed, this will refresh it. And I respectfully suggest that this

is assuming too much, this procedure.

I don't intend to suggest that we should in each case be limited by the formal rules, but I think that on a matter of this importance we should go by what the witness says, of his own memory and recollection, and not by what is said in a paper which hasn't been identified in this court room as anything. Therefore, I object to that form of procedure.

Justice Stephens. I am sorry, Mr. Adams, but the Court doesn't yet quite see the objection, provided the witness is asked more definitely. "You will note that in proposed

Exhibit 203, reference is made to a meeting in New York at which your presence is referred to, on such-

and-such a date, or on or about such a date, and with such-and-such a person," making it sufficiently definite—"did you attend such a meeting?" If the witness doesn't remember it, all he has got to do is to say so.

Mr. ADAMS. The difficulty with that, Your Honor, is that I always understood you were supposed to ask a witness

whether or not a certain fact was or was not true. Now the fact is—was there a meeting? That is the question. Maybe I am wrong about this.

Justice STEPHENS. That is implied in the question, and if you are making an objection upon the ground that the question assumes a fact not in evidence, that might be dif-

ferent.

Mr. ADAMS. I don't want to raise that. I am simply raising the point that by this method of examination, what we are doing is departing from what I understood to be the proper procedure, which is to test the recollection of the witness. The question, as I understand it, is—was there a meeting or wasn't there? If he says, "I don't remember", then you can show him a piece of paper and ask him if that refreshes his recollection.

Justice Jackson. I think Mr. Knuff is asking the witness' recollection, and then he is going to endeavor to re-

fresh it, if he can, with this exhibit.

Mr. KNUFF. That is right. 1469

Mr. ADAMS. But so far, he has only shown him a piece of paper and said, "Did you go to the meeting that

is referred to in that paper?"

Justice Stephens. You understand, do you not, Mr. Holland, that you are not asked to testify to anything that you don't remember, and you should protect yourself in that respect. If you don't remember something, say so.

Mr. KNUFF. Mr. Reporter, will you please read my ques-

tion?

Justice STEPHENS. I am afraid you haven't got one now. Mr. KNUFF. I don't know. I want to find out what the state of the record is.

Justice STEPHENS. All right.

(The record was read by the reporter as follows:

"Q. And the letter is dated October 11, 1928, is that correct?

"A. Yes, sir.")

Mr. KNUFF. Suppose we start all over again.

By Mr. KNUFF.

Q. Mr. Holland, did you attend a conference in New York in the month of October, 1928, whereat Mr. Reeb, Mr. Haggerty, Mr. Baker, Mr. Walker and Mr. Warren Henley were in attendance?

A. I couldn't say that I did or that I did not.

Q. Did you ever meet with the gentlemen that I have mentioned, at or about that time?

1470 A. That is the same question, isn't it? Q. No.

Justice Stephens. It isn't quite the same question, Mr. Holland. The other question related to a particular date. He wants to know now whether you met with those gentlemen in New York at or about that time, if you remem-

The WITNESS, I would make the same answer, that I can't remember whether I did or I did not.

#### By Mr. KNUFF.

Q. Were you ever at a meeting in New York where Mr. Ebsary invited you to come to his room in the hotel?

A. I can remember of being in his room at a hotel one

time in New York.

Q. And who else was present at that time?

The one time I remember, just Mr. Ebsary.

Q. Just Mr. Ebsary and yourself?

A. That is right.

Q. Did you ever meet with Mr. Reeb, Mr. Haggerty and Mr. Baker in the office of the Certain-teed Products Company sometime in the month of October, 1928?

A. I don't remember of meeting with them there.

Q. You haven't any recollection of any such meeting?

A. No. sir. Q. Very well, sir.

I show you, sir, what has been marked for Identification Government's Exhibit No. 204, the same being a letter dated January 7, 1929, addressed to Mr. J. F. Haggerty, President, and signed by Eugene Holland. I will ask you to look at that letter and tell us whether that is your. signature on it?

(The letter referred to was marked as Government's Ex-

hibit 204 for Identification.)

(Exhibit 204 handed to the Witness.)

The WITNESS. Yes, sir.

By Mr. KNUFF.

Q. That is your signature?

A. Yes, sir.

Q. And you dictated that letter?

A. Yes, sir.

Q. I direct your attention, sir—
Mr. OLIVER. (Interposing.) May we see a copy of that?
Mr. KNUFF. They were passed down to counsel.

Mr. BROMLEY. Not this one.

Mr. Johnston. We don't get to see these exhibits at all.

Justice Stephens. I thought they were handed to counsel yesterday.

Mr. KNUFF. That was my understanding, sir.

Mr. Johnston. He handed one copy to Mr. Bromley, and I guess this one he didn't even get. We are not see-

1472 ing any of these things that are going in.

Justice STEPHENS. Well, that has to be stopped. You have got a right to see them. Is there another set of these somewhere that you can hand to defendants' counsel? Mr. KNUFF. My recollection and Mr. Bromley's recollec-

tion apparently differ.

Justice STEPHENS. Have you seen the exhibits that came

in yesterday, Mr. Johnston?
Mr. Johnston. You say have I seen them?

Justice STEPHENS. Did you see the exhibits that came in

yesterday?

Mr. JOHNSTON. I glanced at one or two just as they were being handed in. I have the exhibits that went in up to the Thanksgiving recess. I gave a receipt to the reporter and got them and had them photostated. Those are the only ones I have.

Justice STEPHENS. Well, something must be done to give the defendants an opportunity to see these exhibits. The Court spoke informally to Mr. Berge the other day — I happened to meet him socially—and told him of the Court's earnest desire that photostats be furnished. I assume that you have already yourself gotten that message to Mr. Berge?

Mr. KNUFF. No, I haven't, Your Honor. I haven't had

an opportunity to get it to him.

up that part of the record—it is around page 1534—where the Court directed a message to be delivered by counsel for the Government to Mr. Berge, the head of the Antitrust Division of the Department of Justice, indicating to him that while the Court didn't have power to order the photostating of exhibits, the Court did feel that the Government ought to furnish these exhibits in photostatic form, or some form, to the defendants' counsel; otherwise, we would have to take an adjournment long enough to give them a chance to inspect them.

The REPORTER. I will.

Justice Stephens. It would approach a denial of due

process, it seems to me, if the defendants can't be apprised of the evidence which is being offered against them in time

to consider it and make possible objections.

If you will have that written up, Mr. Reporter, the Court itself will send it to Mr. Berge. I think that that ought to have been called to the attention, Mr. Knuff, of Mr. Berge before this. I have assumed that the Court's injunctions or requests were being complied with, and that defendants were getting these exhibits, or that otherwise we would have heard from them.

Mr. KNUFF. I don't want Your Honor to assume that I didn't make the attempt to get in touch with Mr. Berge. I did do that, Your Honor, promptly, the same day, when

I left here. I don't want you for one minute to think

1474 that I have ignored it.

Justice STEPHENS. I understood you to say that you hadn't time to see him.

Mr. KNUFF. If I said that, I misspoke myself. I meant

that I hadn't been able to see him.

Justice Stephens. I am sorry if I misunderstood you.

Mr. Johnston. Economy of time is another thing of great importance. Yesterday I took it upon myself to hold my watch on the time that we were out examining these exhibits, and it was 42 minutes of yesterday's time that was occupied, that was wasted, I think. If we could have had these exhibits the day before so we could have examined them—it would be economy of time to have them.

Justice Stephens. There is no doubt about that, but the Court at the present moment is confronted with the proposition that the photostats are not yet in existence in sufficient numbers to distribute one to each lawyer. The only other thing we can do at the present time is to give you a recess, if you ask it, long enough to examine the exhibits which were introduced yesterday and are being examined on today. If you feel that your rights require that, the Court will grant you a recess for half an hour or for an hour, whatever time you need.

Mr. KNUFF. As I say, I was quite sure that I hand-1475 ed them down to Mr. Bromley, and Mr. Bromley is

just as sure that I didn't.

Mr. Bromley. Here is the document that he gave me. It is a photostatic copy of the document that has now been marked Exhibit 203 for Identification. I handed it promptly down the line so Mr. Johnston might see it.

Mr. KNUFF. The copy Mr. Bromley has in mind, I gave him just a moment ago. What I have reference to is the

series of exhibits beginning with May 18, 1943, which was handed over yesterday.

Mr. BROMLEY. I don't remember anything about them.

I certainly haven't got them.

Justice STEPHENS. Well, do defendants' counsel ask for a recess in order to inspect the exhibits which Mr. Knuff has just referred to, and others now being considered?

Mr. OLIVER. I do, Your Honor, because what was handed to us yesterday ended up with Exhibit 201. Now we have never seen Exhibit 204. Exhibit 203 did come down just a moment ago.

Mr. Knuff. Did you see Exhibit 202, sir?

Mr. OLIVER. No, Exhibit 201 is the last one in here.

Justice STEPHENS. The plot thickens. Apparently a long series of exhibits was handed to defendants' counsel. You have it in your hand, haven't you, Mr. Oliver?

Mr. OLIVER. These stop at 201.

Justice Stephens. Very true, but I understood you were representing that you hadn't seen any of those at all.

Mr. OLIVER. Oh, no, I wasn't representing that at all. Justice STEPHENS. Wasn't that your complaint, Mr. Johnston?

Mr. Johnston. I represent that I haven't seen them, and I didn't know that Mr. Oliver had them until now.

Justice STEPHENS. Well, the Court will be in recess for 15 minutes, and the defendants' counsel may have the Court's copies of these exhibits.

(Thereupon, a 15-minute recess was taken, after which

the trial was resumed as follows:)

Justice Stephens. Proceed, gentlemen.

Mr. KNUFF. May it please the Court, in the present state of the record I feel that there might be some reflection, not intentionally, cast upon the Department of Justice, and I would like the record to contain this statement, if I may.

I did endeavor to get in touch with Mr. Berge, as I

said, and was unable to contact him,

Concerning the exhibits that I now have in my hand, which begin with 202, it is my recollection that I handed these exhibits to Mr. Bromley yesterday. I examined at some length as to the third paragraph from the bottom of that exhibit, that was about conditions tending to eliminate competition. Mr. Oliver has just told me that he saw

this memorandum of the 18th of May, 1928, yester-1477 day. They were all clipped together. Now I don't know what happened to them, I can't explain it. Probably somebody gathered them up unintentionally yes-

terday and put them in their brief case.

Justice STEPHENS. Mr. Knuff, there is no intention on anyone's part to reflect on anyone. I am sure you have done your personal best to get the exhibits, but we will have to take some steps, the Court will consider some steps to get them in some way.

Mr. KNUFF. As soon as I leave the courtroom this evening I am going right over to Mr. Berge's office and camp on the outside of it until I get in. I will explain to Mr. Berge what I attempted to explain to Mr. Berge the other day but was unable to contact him, and I will assure Your

Honor that I will make every effort.

The thought occurred to me that in case there is any objection to the Government paying for a set of 7 exhibits, I was going to suggest to Mr. Berge that possibly we might furnish one set of photostats the night before, to the defendants, that we were going to use the next day, and let the defendants then have that set of photostats photostated. Would that meet with Your Honor's approval?

Mr. JOHNSTON. May I be heard, if the Court please,

when he is through?

Justice STEPHENS. You may be heard.

1478 Mr. KNUFF. I am through. I just wanted to know if that would meet with the Court's approval if I would do that.

Mr. Johnston. First, I want to get everybody straight-

ened out on what happened.

Yesterday afternoon there was handed down the line a batch of exhibits, 197 to 201, inclusive. Those were the minutes of the meetings, to which I objected, and the Court overruled my objection.

Yesterday evening, after the closing, there was handed to me, and it came down the line here from somebody, or I picked it up, what has been introduced—and I see received —as Exhibit 202, and which I want to object to on the same grounds that I objected to the minutes, for the record.

Now during the intermission, I received Judge Jackson's set of exhibits, the first one of which is Exhibit 202. Then there follows 203, 204, 205 and I think 206, 207 and 208.

Now I submit that all anybody saw yesterday afternoon of the second set of exhibits was the single Exhibit 202 that came down the line. We did not see the others in that series.

Now I address myself to the suggestion of counsel. You

can't get photostatic copies made on that short notice by delivering one set to counsel the evening before, and then expect all of counsel to examine that set that night and be back here ready to operate in the morning. It isn't

back here ready to operate in the morning. It isn't fair, it isn't practical, and I don't think it is possible.

Now I can't see why counsel for the Government doesn't know today about what witnesses they are going to use and what exhibits they are going to use four or five days from now and if the Government is unwilling to furnish us with these copies and the Court feels that it does not have the power to compel the furnishing of them, then we are either going to have to adjourn from time to time and take up a third of the time of the Court here in examining exhibits, or we are going to then have to ask the Court to implore the Government to furnish us exhibits sufficiently far in advance that we may have them photostated, at a great expense. It is a most extraordinary circumstance, indeed.

Justice STEPHENS. The Court doesn't feel that it is lacking in power to compel the Government to show you the exhibits that it is offering in evidence. Of course, it has power to do that, and it hasn't been called upon to exercise that power. The Government has shown you the exhibits which it is actually offering in evidence. The Court doesn't have power to order a particular expenditure of funds by the Department of Justice. But the Court does think—the Court discussed the matter during the recess—that in view of the length of time which this case has

been in the courts, the fact that it went through in some part a criminal trial and has been pressed

for trial for a year or so, that the Government ought to know to some extent, in advance, the nature of its evidence so that it could get these exhibits to the defendants, if in no other way, a few days in advance of their actual use.

The Court isn't criticizing, Mr. Knuff. It may well be due to the fact that the responsibility of acting as trial counsel in this case has come suddenly upon you, and I am not criticizing you or anybody. But it does seem to us that something can be done. I don't think the Court can require the defendants to go to the expense of spending their funds any more than it can require the Department of Justice to do so. The usual way in simple cases, of course, that are not complicated, is for the Government to mark an exhibit and hand it over to defendant's counsel, there is usually only one lawyer. And in a few minutes

he can tell what it amounts to. There are usually only half

a dozen exhibits in most cases.

But we will ask you to see Mr. Berge, and you are authorized to state to Mr. Berge that the Court requests him to see you on this subject. The Court really feels very seriously about it, Mr. Knuff, and you may say so to Mr. Berge.

If Mr. Berge feels that he lacks power to aid the Court in this respect, with all of the expense and difficulty

1481 and time we are all put to here, 3 judges and 8 or:
10 lawyers, for Government and defendants both,
the Court will apply to the Attorney General himself, if

necessary, to get some help in this situation.

It is just a foolish waste of time to have to adjourn and adjourn this case in order to permit an inspection of exhibits. It wastes your time, the Government's time, and the defendants' time and the witness' time, to say nothing of the Court's time. Here we are, 3 judges from busy courts, all of us from another court than this three-judge court. We must move forward.

Thank you for your efforts so far, and please renew

them with vigor.

1482 Mr. KNUFF. I certainly will, your Honor, I give you my assurance.

Justice STEPHENS. See if we can't return to business for a while.

By Mr. KNUFF.

Q. Do you have before you, sir, Exhibit No. 204?

A. Yes, sir.

Q. I call your attention, sir, to the second paragraph of that letter, the first sentence, in which you state, "It is my opinion that we should make an effort to hold another meeting of those interested in the board situation". Do you see that?

A. Yes, sir.

Q. When did you hold your first meeting concerning those interested in the board situation?

A. I don't remember.

Q. Well, had you held a meeting previous to the one that you were suggesting in your letter of January 7, 1929, Exhibit 204?

A. I don't remember.

Q. You will notice that first the words in the second line of that paragraph are "another meeting." Does that imply that there had been a previous meeting, sir?

A. I would think so, yes.

Q. But you don't recall whether or not a former meeting was held.

1483 A. No, sir.

Q. In the second sentence of the second paragraph you state, "Mr. Kling surely should consider the others involved to the extent of at least letting us know" and so forth.

Why did you think that Mr. Kling should "consider the

others involved", sir?

A. Well, I really don't remember, but connecting it up with some of these other exhibits, no one interested in saving the company the way I was could do very much until he knew the attitude of the others.

Q. Pardon me, sir, I did not understand you.

Mr. KNUFF. Will you read the answer, Mr. Reporter? (The last answer was read by the reporter.)

### By Mr. KNUFF.

Q. Why was it necessary, sir, for you to know the attitude of the others?

A. Just to know what to expect in the future.

Q. And the attitude of the others on the board situation would guide your future conduct, is that what you mean?

A. I think that it probably was the thing I had in mind.

Q. What did you mean by "those interested in the board situation"?

A. I would think that it probably meant the manufacturers of wallboard.

1484 Q. And what "situation" was involved at that time?

A. You mean -

Q. (Interposing.) What was the situation that you are

referring to here, sir, the "board situation"?

A. I don't remember exactly. Probably, or it could have been, the fact that part of the industry was licensed and was making a closed-edge board, and part of the manufacturers were not licensed, and were making an open-edge board.

Q. And is that what you mean by "board situation"?

A. I am not sure that it was, I say that might have been.

Q. How did you propose to correct that, then?

A. Well, as I testified before, I hoped that other board manufacturers would take out a closed-edge license, take out a license on the closed-edge patent.

Q. Now I call your attention, sir, to the third paragraph of the letter, the first sentence, reading, "Rather than initiate the move again myself, it would probably carry more weight if you and Mr. Brown would request me to call such a meeting". Had you previously initiated any move which you mentioned there in that letter?

A. Oh, I think I kept trying to talk these people into tak-

ing out a license.

Q. You think you did? A. I think so, yes, sir.

Q. Can you recall whom you talked to?

A. No, I imagine that I talked to all of them. Q. And can you fix the time that you talked to them?

A. No, sir, I am sorry.

Q. I mean with reference to this letter.

A. No, sir, I am sorry.

Q. Well, you entered the gypsum industry in 1928; is that right.

A. That is right.

Q. And this letter is dated the 7th of January, 1929?

A. That is right.

Q. Now during the year 1928 is it your best recollection that you talked to all of the manufacturers in the board industry in order to interest them in a license agreement?

A. Not necessarily in order to interest them in the

license agreement.

Q. Well, whom did you talk to concerning a license

agreement?

A. Well, I don't remember definitely, but I would assume that I talked to everyone that had a license and everyone that didn't have a license.

Q. Why would you talk to those people that already had

a license?

1486

A. To learn what they thought of it, how it was working with them, what were the defects in it—anything to learn something about the business which I knew nothing about when I came in.

Q. Did you feel that the manufacture of a closed-

edge board was desirable for the industry?

A. I so stated yesterday.

Q. And what were your reasons for feeling that way?

A. Because it was a better product.

Q. That is, a better product from the consumer's point of view, or a better product from the manufacturer's point of view?

A. Both.

Q. From a manufacturer's point of view, was it as costly or a more costly product to manufacture than open-edge board?

A. I don't know for sure.

Q. You were associated with the industry for how many years?

A. Seven years.

Q. And what was your previous training-as an engineer?

A. No, sir.

Q. What was your previous training? A. Retail lumber and building material.

Q. I see. In the manufacture of open-edge board was there any waste?

A. I think so, for most companies.

Q. The edges of the board would have to be trimmed, is that correct -

Justice Jackson (interposing). Did you ever manufacture any open-edge board?

The WITNESS. No, your Honor.

Mr. KNUFF. Would the edges of the board have to be trimmed?

Mr. Bromley. I object to it, then, as speculative. If he never made any board he doesn't know.

Justice STEPHENS. If he doesn't know about it, there is

no use asking him about it.

Mr. KNUFF. If he doesn't know about it, yes, but here was the president of the Universal Gypsum Company and I suppose that the president of the Universal Gypsum Company knew something of their manufacturing processes.

Justice Jackson. I understood from his testimony yesterday that he stated that when he came with Universal they were making a closed-edge board, or a partially closed

edge board.

Mr. KNUFF. That is correct.

Justice Jackson. But not an open-edge board.

Mr. KNUFF. That is right.

Justice Jackson. I asked him if he ever made any openedge board while he was there and he said no—isn't that your answer?

The WITNESS. Yes, your Honor.

#### By Mr. KNUFF.

1488 Q. Do you know whether there was any breakage in the manufacturing and handling of open-edge board?

Justice STEPHENS. Isn't that admitted in the case, and already in evidence? Is there any dispute as to the fact that it was more expensive? Mr. Griswold so testified that it was more expensive to make open-edge board.

Mr. BROMLEY. There is no dispute whatever.

Mr. KNUFF. That it is more costly to make open-edge board?

Justice STEPHENS. Yes.

Mr. KNUFF. If that is admitted, that is what I was trying to bring out.

Mr. Bromley. It is not only admitted, but it is asserted,

sir.

Mr. KNUFF. That makes it doubly better.

By Mr. KNUFF.

Q. Now refer to the next to the last paragraph of Government's Exhibit 202, where you say —

Justice Jackson (interposing). Government's Exhibit

202?

Mr. Knuff. I beg your pardon, Government's Exhibit 204—where you say, "Personally, I cannot see how the American can hope to gain anything at all by delaying the settlement because of the fact this delay is going to be the cause of demoralizing prices during most of 1929 unless the situation is handled promptly". Do you see that, sir?

The WITNESS, Yes, sir.

1489

By Mr. KNUFF.

Q. What prompt action on the part of American would relieve that situation?

A. I don't know that it would.

Q. You so state in your letter that it would, do you not?

A. I express an opinion, I guess.

Q. Well, what was your opinion, then, as to what prompt action of American was necessary to relieve this demoralized condition?

A. I don't remember exactly. There are two things that it might have meant. One of them is the same thing I mentioned yesterday, that the closed-edge board usually brought some premium in the market over the open-edge board, and yet it was a hard thing to sell against because of the difference in the prices and the quotations that you heard reported in the market. That always had a very demoralizing effect. You would hear of a competitive price on sup-

posedly closed-edge board, and you might find out, after you had met the price, that it was open-edge board and if there was only one type of board, the closed-edge, you would know that you were competing with a similar product.

The other thing had to do with the fact that while there was a lot of litigation and bad feeling in the industry, plus this injunction that I referred to before, it was very difficult to get the business men to sit down and even discuss

industry problems, which usually has a demoraliz-

1490 ing effect if that cannot be done within the law.

Q. What prompt action did you want USG to

take? Mr. Bromley. USG?

Mr. KNUFF. I beg your pardon.

By Mr. KNUFF.

Q. What prompt action did you want American Gypsum

Company to take?

A. Presumably I hoped that they would settle their litigation and sign a license agreement to manufacture the closed-edge board.

Q. I show you what has been marked for identification

as Government's Exhibit No. 205.

Justice Garrett. Are you introducing 204, or not?

Mr. KNUFF. Not yet, your Honor. Justice STEPHENS. What is 205?

Mr. KNUFF. Exhibit 205 for identification is a letter, dated January 9, 1929, addressed to Mr. Eugene Holland and signed on the back, "President" and on the right-hand side of the page there is typed in the name "J. F. Haggerty: MP"——

Justice STEPHENS (interposing). That is on the left-hand side of the page, is it not? Perhaps you have a negative and we have a positive. It is on the left-hand side on the exhibit we have.

Mr. KNUFF. The left-hand side is right.

1491 (Government Exhibit No. 205 for identification was handed to the witness.)

· The WITNESS. Yes, sir.

### By Mr. KNUFF.

Q. You have read the lefter, sir?

A. Yes, sir.

Q. Do you recall receiving the original of that?

A. No, but I evidently did.

Q. I direct your attention to the second paragraph of that letter reading, "The question now in my mind is whether or not the other four board makers, who are outside the license agreement, feel that it would be advantageous to go in without the American Gypsum Company".

Do you know why the other four board manufacturers would hesitate to enter into any license agreement unless the American Gypsum Company entered into a license

agreement?

A. You mean can I think of a reason now?

That you had at that time.

Q. That you had at that time. A. Well, I don't remember what reason I might have

had at that time.

Q. You will notice that the last sentence speaks of a meeting to discuss that point, that is the last sentence of paragraph 2. Do you know whether that meeting was held?

A. No. I don't remember.

Q. Will you refer to the last paragraph of the letter where Mr. Haggerty said, "I would like to hear from you", and so forth? 1492

A. Yes, sir.

Q. Did you answer this letter?

A. I don't know.

Q. You have no recollection of answering it?

Mr. KNUFF. If your Honor please, we offer in evidence Government's Exhibits Nos. 204 and 205.

Justice STEPHENS. You are not now offering Exhibit

203?

Mr. KNUFF. It has not yet been identified by Mr. Black, the author of that letter.

Justice Stephens. That is right. You are offering now

Mr. KNUFF (interposing). Exhibits 204 and 205.

Justice Stephens. Exhibit 204 is admitted in evidence. subject to the usual reservation of the Court with respect to this class of declaration on the part of an alleged coconspirator.

Mr. OLIVER. If the Court please, I object to the receipt of Exhibit 205. It has not been identified as ever having

been received by the witness.

Justice Stephens. Well, the Court has some question about Exhibit 205. Are you going to call Mr. Haggerty or is he not living?

Mr. KNUFF. He is dead, your Honor.

Justice Stephens. The Court's process will not reach that far. (Laughter.)

Mr. KNUFF. May I say a word, your Honor?

Justice STEPHENS. Yes.

Mr. KNUFF. Government's Exhibit No. 205 was obtained by us from the files of the National Gypsum Company under subpoena issued in this case. It was a record apparently that they kept in their files. Whether or not this witness ever received the original is immaterial, it is still a declaration, whether it was mailed, whether it was received, or no matter what happened. It came out of the files of National and I believe Mr. Finck will verify that statement.

Justice STEPHENS. Is that correct, Mr. Finck?

Mr. FINCK. Yes, that is correct.

Justice STEPHENS. It may be admitted in evidence subject to the usual reservation with respect to this class of declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos.

204 and 205, respectively, were received in evidence.)

Justice STEPHENS. The Court has an extra copy of what has been marked Exhibit 203 for identification. Will you hand that to counsel?

(Government Exhibit No. 203 for identification was

handed to Government counsel.) .

# By Mr. KNUFF.

.Q. I show you, sir, what has been marked for identification as Government Exhibit 206, the same being a letter dated January 12, 1929, addressed to Mr. J. F. Haggerty, President, and signed, "Eugene Holland." I wish you would look at that letter and state whether or not that is your signature.

(Government Exhibit No. 203 for identification was

handed to the witness.)

A. Yes, sir.

Q. Will you look, sir, at the first sentence of the first paragraph in Exhibit 206, and tell me what you meant by the term "wallboard proposition"?

A. I don't remember for sure. Reading it today I

would think that it probably had to do with the settlement

of the litigation and the taking out of a license.

Q. Would you look at the second sentence. "You will remember that Mr. Avery made it-very clear to us that if this plan could not be worked out on the Utzman patent that there were other patents available", and so forth.

Do you notice that, sir?

A. Yes, sir.

Q. What occasion were you calling to Mr. Haggerty's attention that Mr. Avery participated in?

A. May I hear that question again, please?

Mr. KNUFF. Will you read it?

1495 (The pending question was read by the reporter.)

By Mr. KNUFF.

Q. You will note you start off by saying, "You will remember"

A. I don't remember, for sure.

Q. You haven't any present recollection of what you were asking Mr. Haggerty to remember?

A. I haven't any recollection of it as to that time, no.

sir.

Q. When you say that Mr. Avery "made it very clear

to us", whom did you mean by "us"?

A. That I don't remember. I would say from reading this, however, that it sounds like it means that he made it clear to Mr. Haggerty and myself,

Q. Is that your recollection today?

A. No, sir, that is my interpretation of this statement here.

Q. I see. Well, again I want to say that I am not casting any aspersions on your truthfulness, and I don't want you to think that the next question does, but I want to ask you—did you write truthful letters?

A. Does the witness have any right to express himself

on a thing like that?

Justice Stephens. Yes, you may express yourself.

The WITNESS. Well, I rather resent the implication, sir. Justice Stephens. Well, Mr. Knuff has explained

that he doesn't mean to cast an imputation upon your truthfulness, and the Court doesn't interpret his question that way, Mr. Holland. I think what counsel means—it is put in a little unusual form—is to indicate to you that since you wrote this letter it must likely be a reference to some events or conferences with individuals whom you knew of at the time, and the question is an attempt to probe your recollection.

The WITNESS, Well, I will answer the question this way,

that I always try to write truthful letters.

By Mr. KNUFF.

Q. And your statement there that "Mr. Avery made it

very clear to us that if this plan could not be worked out on the Utzman patent that there were other patents available", and so forh—is that a truthful statement?

A. I would think so, yes, sir.

Justice STEPHENS. The Court will suggest to Mr. Knuff that just as much would be accomplished by asking if it is a correct statement. The Court can appreciate the feelings of the witness being constantly asked whether his statements are truthful. The examination is, I assume, being conducted upon the assumption that the witness' statements are truthful.

Mr. KNUFF. Throughout. I do not for one minute feel that Mr. Holland is giving any untruthful answers. I just wanted to make sure that he couldn't think that by my question I intended to imply that he was untruth-

1497 ful. I don't think so.

Justice STEPHENS. We realize that, Mr. Knuff.

## By Mr. KNUFF.

• Q. Now the question that is before you, sir, I believe, is what plan was going to be worked out? That is in the fourth line of the first paragraph.

A. I don't remember, exactly.

Q. Well, what is your best recollection, if you don't remember exactly?' Give us your best recollection.

A. Well, there were several patents including one that

the Universal owned, that were in the industry.

Q. I am referring to a "plan". My question is what plan did you have in mind?

A. Well, that is what I am not clear on.

Q. Your answer to that was that you are not clear exactly. Now I say—what is your best recollection of the plan?

Justice STEPHENS. If you have a recollection. If you

haven't one, say so.

The WITNESS. I have no recollection.

By Mr. KNUFF.

Q. And you say further, in the first paragraph, "• and we were all agreed that the fact that the Utzman patent expires next August is not a practical reason for continuing the conflict". When you say "we were all agreed"—whom did you mean by "we"?

1498 A. I am not sure. Tied in with that letter, it would sound like Mr. Haggerty and I and possibly

Mr. Avery, if we had talked to him about it.

Q. Well, did you have any plan, sir, based on the Utzman

patent, or did you have a plan based on some other patent?

A. Not that I remember. Was the Utzman patent the closed-edge patent?

Q. That is correct, sir.

A. Well, it would be a plan on that if everyone was licensed under it in the industry.

Q. Well, why were patents so necessary for the plan that you had in mind, or why did you think they were necessary?

A. Well, as I stated before, I thought the industry would be better off by a uniform and better product.

Q. Well, why were patents necessary for your plan?

A. Because there was a patent—I was going to say I thought it had been adjudicated, but I am not sure—but there was a patent there that made a better board which make a uniformly good board in the market.

Q. But apparently your plan here was based upon some patent. Now what I am asking you is this. Why was a pat-

ent necessary for the plan that you had in mind?

Mr. Bromley. I don't think that there is any evidence that he had any plan in mind. I object to it as assuming a fact not in evidence.

Mr. KNUFF. The context of the second sentence clearly indicates that. "You will remember that Mr. Avery made it very clear to us that if this plan could not be worked out on the Utzman patent that there were other patents available and we were all agreed that the fact that the Utzman patent expires next August is not a practical

reason for continuing the conflict."

Now evidently the plan was based either upon the Utz-

man patent or upon some other patent, your Honor.

Justice STEPHENS. That is argumentative, and while that may be the case, this witness has definitely stated he does not remember any plan. Therefore, the question just asked assumes that he had a plan in mind. The objection is sustained.

### By Mr. KNUFF.

Q. At the end of the last paragraph you use the words, "continuing the conflict". What did you mean by that?

Justice Jackson. That is at the end of the first paragraph.

Mr. KNUFF. At the end of the first paragraph, yes, I beg

your pardon.

The WITNESS. I don't remember whether I was referring to the demoralized condition or to the patent litigation that

was prevalent in the industry.

By Mr. KNUFF.

Q. The market conditions were demoralized at this time, were they?

1500 A. As I remember it, yes.

Q. And there was also litigation going on in the industry at this time, and you are not quite sure what you had in mind, is that correct?

A. That is right.

Q. Now will you look, sir, at the first sentence of your second paragraph, "It is my opinion that if you and the others interested in the settlement of the wallboard controversy bring enough pressure to bear on the American crowd that something can be done". You say there, "if you and the others"—by "others", whom did you mean?

A. I don't remember, I imagine it would be people that

thought the same as I did about it.

Q. You have no recollection of what you meant by that statement at that time?

A. No, sir.

Q. What pressure did you expect, or what pressure did you contemplate, if you contemplated any, would be brought on the American crowd?

A. Well, I don't remember, but I would connect that up with the next sentence. If Mr. Kling thought that the rest of them felt it was a good idea for themselves, it would probably influence his opinion, and it would be natural for me to argue with the others who thought the same thing

as I did about it, to argue with Mr. Kling as to 1501 the value of taking out a similar license agree-

ment.

Q. By "pressure" do you mean "persuasion"?

A. I would think so, yes.

Q. You state in the second sentence, in the second paragraph, "You will remember that Mr. Kling stated several times that they would be materially influenced by the attitude of the other men involved", and so forth. You notice that, sir?

A. Yes, sir.

Q. Now what were you calling to Mr. Haggerty's atten-

tion that you asked him to remember?

A. Well, just the thing that I have told you before, that evidently, according to this—I don't remember it—but evidently according to this, Mr. Kling had told us

at different times that he would be influenced by our opinion on the license agreement.

Q. Do you have any recollection on that?

A. No, I am merely being guided by what is in this paragraph.

Mr. OLIVER. If your Honor please, isn't it obvious that this witness does not recollect? Why isn't it the best thing to just introduce this letter and be done with it?

Mr. KNUFF. I think we have a right, if your Honor pleases, to ask the witness what he meant by certain things in the letter. If he doesn't remember them, of course he can say that. I am not trying to unduly

1502 prolong this examination, but I am just trying to

get the witness to explain.

Justice Stephens. Well, we think the Government probably has a right to ask the witness, if it feels that it must, about each statement in the letter which he admits having sent, to see if he remembers it. Of course it is becoming pretty apparent, Mr. Knuff, that the witness does not remember anything about it. At the same time, the Court will not foreclose you the right which you probably have to ask him about each sentence in the letter, each idea in the letter. The witness understands, however, that if he doesn't remember, he is to say so. The Court can be informed by the letter, of course, as to what his declarations were; and as to what the letter means, it is the subject of argument and interpretation to be put upon it by counsel when the arguments are made in the case at the close of the case. What we are interested in now is what you remember about it, if you remember anything.

Mr. KNUFF. And I am not interested in the interpretations, I am interested in things that are not explained in the letter, like "plan", and "you will remember"—

Justice Stephens (interposing). We think you are entitled to examine upon that. Do so as rapidly as you reasonably can.

The WITNESS. Maybe I shouldn't try to interpret some

of these things now.

Justice STEPHENS. We are interested in your recollection, not in your interpretation.

By Mr. KNUFF.

Q. You say you are quite sure——
Justice STEPHENS (interposing). Of course I might add
this for the benefit of counsel and the witness, that if your

knowledge of the events, if your recollection of the events and conversations generally which you had at that time throws some light on the letter, you may properly be asked what you meant by a particular phrase in the light of these events or those things that you do recollect. But you are not here for the purpose of putting a bare interpretation of an argumentative character upon this letter. The Court can do that itself. The Court wants the aid of your recollection as far as you have it.

1504 By Mr. KNUFF.

Q. The next to the last sentence in paragraph 2 reads: "I am quite sure that Mr. Avery would not be interested in negotiating settlements unless everyone involved was included." What did you base that on, sir?

A. I don't remember.

Q. You have no recollection on that?

A. No sir.

Q. You will notice that in the last paragraph you say, "I am expecting to be East next week, at which time I will talk further with Mr. Brown" and so forth. Had you had a previous conversation with Mr. Brown?

A. I don't remember as to the dates, but I would say that if I put that in the letter it was a pretty good sign

that I had a conversation with Mr. Brown.

Q. Which Mr. Brown did you have reference to? There were two Browns, C. O. and George Brown.

A. It probably meant George Brown.

Q. Do you recall when you had that conversation?

A. No sir.

Q. Do you recall anything concerning the conversation?

A. No sir.

Q. You will notice that in the last sentence you ask him to give you "any new information" he has. What information were you expecting to receive, and what did you have in mind?

1505 A. I don't know.

Mr. KNUFF. If Your Honor please, we offer in evidence Government's Exhibit 206.

Justice STEPHENS. Is there any objection other than the usual objection to this class of evidence?

Mr. BROMLEY. No sir.

Justice STEPHENS. It may be received in evidence, subject to the usual reservation of the Court with respect to declarations of alleged co-conspirators.

(The letter referred to, marked as Government's Exhibit No. 206, was received in evidence.)

By Mr. KNUFF.

Q. I show you, sir, what has been marked for identification as Government's Exhibit 207, the same being a copy of a telegram dated 5-18-29, addressed to Mr. Eugene Holland, and signed S. L. Avery. Will you state whether or not you received this telegram, sir?

A. I don't remember receiving that telegram.

Q. Is that your address given there, sir, 5114 Dodge Street, Omaha, Nebraska

A. That was my mother's home; that address is my

mother's home.

Q. But you haven't any recollection of receiving that telegram?

1506 A. No sir.

Q. Did you attend any meeting in or about May,

A. Yes, I think so.

Q. Where was that meeting held?

A. Now I am not sure as to the date, but I think there was a meeting in the Palmer House, at Chicago, Illinois.

Q. At about the time referred to in the telegram?

A. I would think so.

Q. That is your best recollection?

A. Yes, that is my general recollection.

Q. What was the character of this meeting, sir? Who

attended the meeting?

A. Well, I attended a meeting there of board manufacturers to consider the proposition being effered by the United States Gypsum Company in the way of a license agreement.

Q. You say you attended?

A. Yes sir.

Q. Who else attended?

A. Well, I am not sure, but I think that representatives of the United States Gypsum Company were there; I think the Ebsary Gypsum Company was there; the Atlantic Gypsum Company was there—that is all I am sure of.

Justice STEPHENS. Where did you say this meeting was? The WITNESS. I think it was in the Palmer House in

Chicago, Illinois.

1507 By Mr. KNUFF.

Q. Was a representative of Texas there at that time?

A. I don't remember, I am sure.

Q. National?

A. Yes, I believe National was represented.

.Q. Certain-teed?

A. Yes, I believe they were represented.

Q. Anybody from Kelly, the Kelly Plasterboard Company?

A. Not that I remember.

Q. Anybody from Niagara?

A. I don't remember of anyone from Niagara being

Q. Who represented USG?

A. As I remember it, Mr. Avery, Mr. Henning, and Mr. MacLeish.

Q. Was anybody else there from Universal besides yourself?

A. I don't believe so.

Q. Who represented Ebsary?

A. As I remember it, Mr. Ebsary.

Q. Was Mr. Lenci there at that time?

A. I am not sure. Q. Who represented Atlantic?

A. As I remember it, it was Mr. Fuller and Mr. Neale.

Q. Who represented National?

A. Was Mr. Haggerty alive then?

Q. I don't know, sir.

1508 Mr. FINCK. What was the date? Mr. KNUFF. In May, 1929.

Mr. FINCK. No, he was not.

Mr. KNUFF. I am informed by Mr. Finck that he was

not living at the time.

The WITNESS. I didn't want to make a mistake and say he was there, if he was not living at the time. I think Mr. Baker was there.

By Mr. KNUFF.

Q. Anybody else

A. Not that I remember.

Q. And who represented Certain-teed?

A. I think Mr. Henley.

Q. Warren Henley? A. Yes.

Q. Was there anybody else there from Certain-teed, either Mr. George Brown or Mr. C. O. Brown? -

A. I am not sure on that.

Q. Do you know whether Mr. Gloyd of the Texas Cement Plaster Company was there?

Mr. JOHNSTON. That is objected to as repetitious; he has

already stated that he didn't remember.

Mr. KNUFF. He said he didn't remember whether the Texas Cement Plaster Company was represented. I am now asking him as to a particular individual.

Justice Stephens. You may answer the question. The Witness of don't remember.

By Mr. KNUFF.

Q. How long did this meeting last?

A. It is my impression it lasted just one day.

Q. A whole day or what portion of a day?

A. As I remember it, it started in the morning and ended some time in the afternoon, with a recess for lunch.

Justice Stephens. How much more direct examination

do you expect to have of this witness?

MR. KNUFF. At least an hour and possibly, an hour and

a half, Your Honor.

Justice Stephens. Then we will have to ask you to return again tomor ow, Mr. Holland. The Court would be glad to sit longer, if necessary, inasmuch as the witness is engaged in war work, but we probably wouldn't accomplish anything, especially in view of the arduous hours of the court reporter. So we will adjourn at this time.

Before we adjourn let me make this statement, that even if Mr. Berge is able to get these photostats arranged for, it will take a day or so to get them, I suppose. Now what can we do tonight? Have you in mind any exhibits which you can informally show to counsel for the defendants after adjournment, and that they can examine during the eve-

ning, exhibits which you intend to use tomorrow, so 1510 that we won't have to interrupt the proceedings

again tomorrow?

Mr. KNUFF. I had intended to contact Mr. Steffen, if he is in town, as soon as I leave here today, and find out exactly what Mr. Steffen's plans are. I have been under somewhat of a handicap here because I have neither a secretary nor any other assistant but myself, and I have been pinch-hitting, and am glad to stay in here and pitch as well as I can, but there is a limit to just how far I can go without some further preparation. I believe that Mr. Steffen had in mind putting on the witness stand Mr. C. O. Brown at the conclusion of Mr. Holland's testimony. I think that the exhibits for his testimony are in order over in the office.

Justice Stephens. Do you have any other exhibits upon which you will examine this witness?

Mr. KNUFF. No, Your Honor, other than those which

they have already seen.

Justice STEPHENS. We appreciate your doing the best you personally can, Mr. Knuff. Thank you.

Announce the adjournment.

(Whereupon, at 4:00 o'clock, p.m., the hearing was adjourned until Thursday morning, December 2, 1943, at 10:00 o'clock).

1511 In the District Court of the United States For the District of Columbia

### Civil Action No. 8017

### UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

Washington, D. C., Thursday, December 2, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearance. (Same as heretofore noted.)

1516 Thereupon, EUGENE HOLLAND, the witness on the stand at the time of adjournment, resumed his testimoney as follows:

DIRECT EXAMINATION (Resumed)

Mr. KNUFF. Before beginning the further direct-examination of Mr. Holland, and apropos of the Court's sugges-

tion of yesterday that I contact Mr. Berge, I was able to get in touch with Mr. Berge. Mr. Berge recalls the conversation that he had with one member of the Court, and he is

very much concerned as to what can be done.

I endeavored to reach Mr. Berge yesterday afternoon as soon as I left here. He, however, was in conference at that time. I left word with his receptionist to call me at my office. I stayed there until after 6:00 o'clock. In the meantime I had placed several other calls to find out if he was free, and he wasn't free.

At about 6:05 yesterday afternoon I made the last call, and I was advised that he was still in conference and that they didn't know when the conference would

be concluded.

This morning just before coming over to Court, I was able to talk to him for a very short time. The conversation had to be necessarily short because I was due over in Court.

Something will be done. He is going to look into the matter of photostats, give it his personal attention. And in view of the fact that no matter what he wanted to do, it couldn't be done until after the Court recessed tomorrow, I am to take it up further with him as soon as I have an opportunity, which I will do.

Justice STEPHENS. Thank you, Mr. Knuff.

By Mr. KNUFF.

Q. Mr. Holland, at the conclusion of yesterday's testimony we were talking about a meeting or a conference that you attended in the Palmer House in Chicago, sometime during May of 1929, and you named the companies that were present, that is, the representatives of the companies. You recall the incident, do you not?

A. Yes, sir.

Q. What was the purpose of that conference, Mr. Holland?

A. As I remember it, it was to discuss a license agreement with the United States Gypsum Company that they were proposing, that it was proposing.

Q. And do you know whether or not there were any minutes of that conference kept, any stenographic report?

A. I know of none.

Q. You don't remember of any?

A. No.

Q. Do you recall anything that was said at that conference?

A. I remember one thing that I said, I think, representing our company.

Q. Do you mind telling us what it was?

A. Well, I can't tell you exactly what I said, but in effect it was that I didn't think that we would be interested in the use of the patent because we owned a patent that served some of the same purposes as this other patent did.

Q. What patent did you have reference to? You owned some patent that served some of the purposes that this

other patent did, you say?

A. Yes.

Q. What patent did you have reference to?

A. The Haggerty and the Hite patents, as I remember the names.

Q. You say that that was a meeting that took place in

May of 1929?

A. I don't remember the date. It seems to me it was

about that time, as I recollect it.

Q. Didn't that conference take place sometime in July of that same year?

A. I am not sure.

Q. But the conference that you have reference to was concerning the "bubble" board patent license?

A. That was the thing I had in mind. That is the one

I am talking about.

Q. You are talking about the "bubble" board arrangement?

A. Yes, sir.

Q. All right, let's go into that a little bit.

What was this so-called "bubble" board patent that USG had?

Justice Stephens. We are a little puzzled. Did you

mean that USG had at that time?

Mr. KNUFF. USG had an application for a patent on the so-called "bubble" board, which is the first Roos foam patent.

Justice Stephens. We understood the witness to say that

his company had it.

Mr. KNUFF. His company had the Hite and Haggerty patents. But the Hite and Haggerty patents and the first Roos foam patent are two different things.

Justice Jackson. I know, but this witness was talking about the Hite and the Haggerty patents. Then you started talking about a "bubble" patent. Were either the

Hite or the Haggerty patents "bubble" patents?

The WITNESS. Your Honor, no, but they served some of the same purposes.

Justice Stephens. We are clear now. Thank you.

Mr. KNUFF. What was my question, Mr. Reporter? (The pending question was read by the reporter.)

### By Mr. KNUFF.

Q. Before you answer that question, let's see if we can

bring out something else.

At the time this conversation took place, whether it was in May or some other time in 1929, were National and Certain-teed licensees under a patent owned by USG?

A. I don't remember.

Q. You don't remember whether National and Certainteed had taken out a previous license from USG?

A. No, I don't remember.

Q. All right, sir.

Now, let's go back. What was this "bubble" patent?

A. Well, I forget the details of it. It was a patent that created a foam in the stucco that made up the interior of the board, and one of its purposes was to make lighter weight board without affecting its strength.

Q. And your company was the owner of two other patents, one of which was known as the Hite patent and the other

was known as the Haggerty patent; is that correct?

1521 A. That is right.

Q. Had your company at that time entered suit against National in the District Court in New York State?

A. Yes, sir.

Q. Was that for an injunction, or just what was the

nature of that suit?

A. Well, I am not sure about the details of that, but when I came into the Universal Company, part of the historical record was to the effect that a suit had been started against the National Gypsum Company previous to my taking charge, and some of our people thought that it had been a terrible mistake to not continue the prosecution of that suit. I think that suit was a request for an injunction.

Q. And for an accounting for infringement?

A. Yes, sir, I think that is right.

Q. Now Mr. Haggerty, who was the inventor of the Haggerty patent, was he formerly connected with Universal?

A. Yes, sir,

Q. And had Mr. Haggerty assigned his patent to the Universal Company?

A. As I remember it, yes.

Q. And was Mr. Williams at one time connected with

the Universal Company?

A. Yes, sir, he was an officer, as I remember it.

Q. Now after Mr. Haggerty had assigned his patent to the Universal Company, did Mr. Haggerty separate from that company?

A. Yes, sir.

Q. And was there another company started in which Mr. Haggerty became financially interested?

A. Yes, sir.

Q: What was that company? Was that National?

A. Well, that is my remembrance.

Q. I think that is correct.

And was the subject of your suit against National brought up at this meeting that you said was attended by you, out in Chicago?

A. I am not sure what stage of development that suit

was in.

Q. I say, was the subject of your suit brought up?

A. I don't remember.

Q. You don't remember that?

A. No, sir.

Q. Now what attitude did your company take with reference to becoming a licensee under the so-called Roos application?

Mr. Bromley. I object to that as calling for a conclusion.

Justice STEPHENS. Read the question.

(The pending question was read by the reporter.)

Mr. KNUFF. It shows his state of mind, Your
Honor. I am going to follow that by asking the
witness if that attitude was communicated to Mr. Avery,
and what Mr. Avery said, and what this witness said to
Mr. Avery.

Justice STEPHENS. We think the question calls for a conclusion, which is objectionable, and that the witness should be asked what was said between the parties on the

subject, if he knows. The objection is sustained.

By Mr. KNUFF.

Q. Did you have any conversation with Mr. Avery concerning the Hite and the Haggerty patents and the so-called "bubble" application?

A. I think so, yes.

Q. Do you recall what that conversation was?

A. Well, I have a recollection to the effect that I told Mr. Avery that I thought we could not be interested in the "bubble" patent, except that we would like to explore the thought of how the "bubble" patent would work with our

starch patent, whether there would be any advantage to us

in the combination of the two processes.

Q. Did you communicate to Mr. Avery at that time that the "bubble" application infringed on the Hite and Haggerty patents?

A. I am not sure, the way you word that question. We were beginning to believe, or I was beginning to be-

1524 lieve at that time that there was more infringement going on in the industry against the Haggerty and the Hite patents than by the National Gypsum Company. Now as to whether that came out in those immediate conferences or whether it was the "bubble" patent that we thought was infringing, I don't remember.

Q. At any rate, what did Mr. Avery say to you when you called that to his attention? If you can't give the exact words, give the substance of what he said to you.

Justice Stephens. Where was this conversation? Was

this at the Palmer House?

The WITNESS. I am not sure, Your Honor, I am confused about the time. Mr. Knuff thinks it was in July. I am not sure when this was.

# By Mr. KNUFF.

Q. Well, what I am asking you about is the conference that took place in the Palmer House at which the representatives of these companies were present, and I believe you stated that the question was discussed as to some application for a license under certain patents, and you mentioned the Hite and the Haggerty patents, and it is my understanding that that came up in connection with the "bubble" board discussion. Now what I have particular reference to is the conversation that took place at the Palmer House in May or June or July. I think we will definitely place that conference at the Palmer House in July.

Mr. Bromley. If the Court pleases, I don't think Mr. Knuff correctly summarizes the testimony. The witness said that Mr. Avery had offered a license under the foam patent, not under the Hite and Haggerty patents. Mr. Avery hadn't anything to do with the Hite and Haggerty patents.

Justice STEPHENS. The Court will not take Mr. Knuff's statement as evidence. Your suggested correction will show

in the record. We will take the witness' statement.

The WITNESS. I would like to elaborate on the statement I made. I am not sure that the conversations that I referred to took place at that meeting. I was broadening out on the

events there. I remember that we did make a statement to the effect, in the meeting, that we were not interested in the "bubble" patent and not prepared to consider a license agreement on that. And I think it was subsequent to that that we threw in this other thought, that we would like to explore the possibilities of the combination. But I am not sure that that took place at that meeting.

# By Mr. KNUFF.

Q. I see. I think I understand your correction.

Now did you at any time inform Mr. Avery that the "bubble" patent application infringed on the claims of the Hite and the Haggerty patents?

A. Well, I think I did, but I can't be too sure of that.
I think we made the statement very definitely that
we thought the USG, in the manufacture of their
board, were infringing by the use of starch or carbo-

hydrates.

Q. Can you recall, sir, what Mr. Avery replied to that? Justice STEPHENS. One of my colleagues doesn't hear either counsel or the witness. Will you please lift your voices a little, gentlemen?

Justice Jackson. He does hear, but I think you are both talking too low. My hearing is exceedingly keen. Today you seem to have a let-down in the timbre of your vocalizing.

Justice STEPHENS. Proceed.

Mr. KNUFF. Mr. Reporter, will you please read the question?

(The pending question was read by the reporter.)

The WITNESS. I don't remember exactly, but I think he said that it was not their policy to use other people's patents in the manufacture of their products, and that he would certainly investigate my claim.

Mr. KNUFF. Will Your Honor pardon me just a moment?

Justice STEPHENS. Yes.

### By Mr. KNUFF.

Q. Did you subsequently, sir, or did your company subsequently, sir, sell the Hite and the Haggerty patents to the United States Gypsum Company?

A. Yes, sir.

Q. When?

1527 A. I am not sure, I think it was sometime in November of 1929.

Q. Do you recall the consideration for that assignment? Mr. BROMLEY. May it please the Court, the contract is

in evidence, which recites a very complicated consideration, as I recall it.

Justice STEPHENS. Which exhibit is that?

Mr. KNUFF. I didn't recall that it was in evidence. If it is, I haven't any desire to press the question.

Mr. BROMLEY. It seems to me it is Exhibit 6. Mr. KNUFF. May I have Exhibit 6, please?

I understand that that is out being photostated, Your Honor.

Mr. Bromley. We will look it up.

Justice STEPHENS. Since the exhibits are out being photostated, and the Court hasn't what it is sure are dependable copies of those particular exhibits, we can't rule on the matter. We will have to look at the agreement to see.

Mr. KNUFF. I haven't any desire to delay the Court, if Mr. Bromley will stipulate that if it isn't in evidence it may

be put in evidence.

Mr. Bromley. It is in evidence, it is the settlement agreement in connection with the Universal license. It spells out the whole deal.

Mr. KNUFF. I haven't any recollection of it.

Mr. Bromley. Here, I will show it to you. (Copy of agreement handed to Mr. Knuff.)

Mr. KNUFF. I am satisfied that the terms of the transfer

are contained in Government's Exhibit No. 6.

Justice Stephens. Very well, then the objection is sustained. The exhibit will speak for itself and show the consideration.

Mr. KNUFF. We now offer in evidence Government's Exhibit No. 207, the same being the telegram dated 5-18-29, signed by S. L. Avery and addressed to Mr. Eugene Hol-

land, 5114 Dodge Street, Omaha, Nebraska.

This copy of the telegram was turned over to us, and was taken from the files of the USG pursuant to the subpoena served upon them. The witness hasn't any recollection of ever receiving it.

Justice STEPHENS. Is there any objection? Mr. Bromley. Only the usual one, sir.

Justice STEPHENS. It may be received subject to the usual reservation with respect to declarations of alleged co-conspirators.

The document referred to, marked as Government's

Exhibit 207, was received in evidence.)

1529 By Mr. KNUFF.

Q. Did your company, Mr. Holland, subsequently become a licensee of USG —

Justice STEPHENS (interposing). One thing I want to inquire about, for the purpose of the record,—this wire from Mr. Avery said, "Mr. Kling has sent in a contract with material changes and declares he will not attend meeting unless these changes are accepted by us Stop We cannot accept them and regret that the Tuesday meeting will be futile unless other companies wish to proceed as outlined without American license". What do you claim the tele-

gram proves?

Mr. KNUFF. The telegram will tend to prove that before any of these companies ever took out a license, in May, 1929, they came together at a meeting in Chicago, they discussed the proposed license, the terms of the license were all explained to them. Some of the companies signed the license on that particular day; others later signed. This is for the purpose of showing that at the time, or at approximately the time of the execution of the industry-wide licensing agreement, all companies knew that the other companies were going to take out a license, and all companies did take out a license at that time with the exception of American.

Justice Jackson. That is a new license, is it?

Mr. KNUFF. Up until -

Justice Jackson (interposing). I thought you said four of these gypsum companies already had licenses.

Mr. KNUFF. Up until the May meeting, four of them had licenses. After the May meeting the remaining companies in the industry all took out a license except American, and this telegram refers to a meeting that was going to be held.

Justice Stephens. Very well, proceed.

Mr. KNUFF. I believe I had a question to the witness that was unanswered.

(The pending question was read by the reporter.)

The WITNESS. Yes, sir.

# By Mr. KNUFF.

- Q. And your company became a licensee under the Hite and Haggerty patents, which you had previously transferred?
  - A. I think that was part of our contract.

Q. I see.

A. Our contract of sale.

Q. I show you, sir, what is marked for Identification as Government's Exhibit No. 208, the same being a letter dated September 7, 1934, addressed to Mr. C. Henning, Vice President, and signed Abel Davis and Eugene Holland, Trustees

of Universal Gypsum & Lime Co., Eugene Holland, Co-Trustee. Will you look at that exhibit, sir, and tell me if your signature appears thereon?

(Government's Exhibit No. 208 was marked for identifi-

cation.)

1531 Justice Garrett. Before the witness answers that, I would like to ask, if I may, at the time the Universal took the license from USG, was it in receivership?

The WITNESS. At the time we made the sale of the patent, Your Honor, and took a license as part of the con-

tract, we were in receivership, yes, sir.

Mr. BROMLEY. If I may interject there, you refer to the

second license, taken in 1929, Mr. Holland?

The WITNESS. I am sorry, I was reading this exhibit.

I didn't understand you.

Mr. Bromley. Because there are two licenses of the Universal Company, I wanted to make sure that your reference was to the second license, which you took out, you said, in November, 1929—you were then in receivership?

The WITNESS. Yes, that is right.

Mr. BROMLEY. The first license, which was taken out in

1926, at that time you were not in receivership?

The WITNESS. No, and I was not at that time connected: with the company.

Justice STEPHENS. Very well.

Mr. KNUFF. That was my understanding. The WITNESS. I have read this exhibit, yes.

By Mr. KNUFF.

Q. Did you subsequently become a licensee of USG under the so-called reflective backing patent that you referred to in Exhibit 208? 1532

A. I am not sure.

Justice STEPHENS. Is that what is referred to as the metalized board?

Mr. KNUFF. Metalized board, Your Honor, yes, sir.

By Mr. KNUFF.

- Q. It is in evidence, sir, that on the 4th day of April, 1935. Universal did become a licensee of USG under the so-called metalized board patent. Were you with the company at that time?
  - A. What was the date, sir?

Q. April 4, 1935.

A. Yes, sir, I was connected with the company then. Q. And did Universal, while you were with it, equip its plant to manufacture metalized board?

A. I don't believe so.

Q. Following this letter of September 7, did you buy metalized board from United States Gypsum Company, if you know?

A. I am not sure; I think we did, and possibly from

others in the industry.

Q. And do you know what prices you sold that for?

A. No. sir.

Q. Did you follow the bulletin prices promulgated by USG?

Mr. Bromley. I object to that as calling for a 1533 conclusion and assuming facts not in evidence. There isn't any proof that any bulletins were sent to this company.

Mr. KNUFF. All the bulletins are in evidence.

Mr. Bromley. But they do not show that any bulletin was ever sent to any company before it became a licensee, Mr. Knuff.

Mr. KNUFF. It doesn't make any difference whether the company received the bulletin or not. The question is-did they sell at the same prices, the same published prices, as USG.

Mr. BROMLEY. If you mean by "published prices" the prices set forth in the exhibits in evidence in this case, towit, the price bulletins, those bulletins show on their face that they only applied to such persons as were licensees, and only applied—and this is shown on the face of the bulletins—to the prices of goods manufactured by the licensee under the patents licensed. That is already in evidence here:

Justice STEPHENS. What exhibit is that?

Mr. KNUFF. It is the series of exhibits beginning with Exhibit 33.

I don't think Your Honors have copies of those, they

haven't been photostated as yet.

Justice STEPHENS. Well, we are under difficulties, you see, not having either the originals or a photo-

static copy of those exhibits. It puts the Court under difficulties with respect to ruling. If those exhibits do show, as Mr. Bromley suggests, that they apply only to products manufactured under a license, the question would seem not to be relevant under the issues.

Mr. KNUFF. It makes no difference whether the bulletins themselves were sent only to licensees. My question iswere the Universal prices the same as the bulletin prices?

Mr. Bromley. If he didn't get a bulletin, how could he

know?

Mr. KNUFF. He could say that. He hasn't answered the question.

Justice Stephens. Perhaps we can save time. Do you

know?

The WITNESS. I don't know, sir. Justice Stephens. Very well.

By Mr. KNUFF.

Q. Now let's go back to your original license agreement that was in existence when you came with the company in, I believe you said, 1928, is that correct?

A. That is right.

Q. Under that agreement did USG from time to time fix the prices at which you should sell the products covered by that license?

A. I believe so. 1535

Q. That is your present recollection, that they did?

A. Yes, sir.

Q. And they continued to fix those prices from time to time all during the period that your company was a licensee under the original Utzman patent, as well as under the Hite and Haggerty patents and the Roos application; is that correct?

Mr. Bromley. I object to that question because it assumes at least two facts that are not in evidence. There isn't any proof here nor any charge that we ever fixed a price under an application for a patent. We never did that.

There isn't any charge that we ever did.

In the second place, there isn't any proof here that we fixed a price after August 6, 1929, when the Utzman patent expired, because under those licenses we only had the right to fix it up to August 6, 1929. We did not have the right thereafter, until the new foam licenses were approved by the receivership court and became effective on November 5, 1929.

Mr. KNUFF. Well, I will rephrase my question.

By Mr. KNUFF.

Q. During the period up to August 6, 1929, state whether or not USG fixed your prices for plaster board from the time you came with the company, under that license?

A. As I remember the license arrangement, they

1536had a right to fix minimum prices. You cover quite a period there.

Mr. Bromley. We will stipulate we fixed the minimum

prices under the Universal license from the date the license

became effective until August-6, 1929.

Justice STEPHENS. The Court was going to ask if that wasn't an admitted fact under the pleadings.

Mr. Bromley, Yes, sir. Mr. Knuff. I believe it is.

Justice Stephens. There is no need of going into it, then.

Mr. KNUFF. The minimum prices that were so fixed—was any territory exempt from the application of those prices?

Mr. BROMLEY. The bulletins, I assume, and the license are the best evidence of that, and therefore I object. I don't

know what the purpose of this question is.

Justice STEPHENS. Do you wish to be heard, Mr. Knuff? Mr. KNUFF. It is our understanding that there were certain portions of the United States as to which USG did not exercise the right to fix minimum prices, that is, in areas in the Southwest, notably in Texas. I-just want to find out what the witness' recollection is as to that.

Mr. Bromley. I don't believe there is any charge in the complaint about that. I never heard that mentioned before at any time in this proceeding. I do not think it is so.

Justice Stephens. The Court has no recollection of that

being a part of the issues in the case.

Mr. Knuff. The issue in this case, if Your Honor please, is—did United States Gypsum Company fix prices under a valid patent? They said they did fix prices. There are certain portions of the United States that we know of where prices weren't fixed. Now I want to develop from this witness, if I can, if he has any knowledge as to what portions of the United States were exempt, or what portions of the United States the USG did not fix their prices in.

Justice STEPHENS. Well, the Court understands the purpose of your question, but the Court doesn't understand the relevance of it, unless there is some charge here in the complaint, denied in the answers, that there was some deviation from a regular price fixing in some parts of the United States. If there is such a charge and it is alleged that it is illegal, then, of course, we must consider evidence on it,

but I don't understand you have charged that.

Mr. KNUFF. There is nothing spelled out in/so many words in the complaint, but we would like to have the whole picture before the Court. If they are fixing prices under the patent in New York State, what are they doing

in Texas and in some place else. We think that is highly

relevant, Your Honor.

1538 Justice STEPHENS. Well, the Court doesn't see the relevance of it unless there is some charge that price fixing was not of uniform character. It has been admitted that price fixing was done under the licenses, and the licenses are in evidence and will show, themselves.

Answer this question yes or no—do you know whether there was any deviation, in localities, from the price-fixing

provided for under the license?

The WITNESS. I do not remember, sir.

Mr. KNUFF. All right, that closes that question.

We now offer in evidence Government's Exhibit 208, Your Honor.

Justice STEPHENS. That is the letter you have just identified?

Mr. KNUFF. That is the letter I just referred to.

Justice STEPHENS. Is there any objection?

Mr. Bromley. None except the usual one, sir.

Justice Stephens, Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The letter referred to, marked as Government's Exhibit

No. 208, was received in evidence.)

Mr. KNUFF. I am through with the witness, and I turn him over to my worthy opponents for cross-examination.

1539 I wonder if we could have a short recess before proceeding?

Justice Stephens. Yes, we will take a five-minute recess.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

1540 Justice STEPHENS. You may cross-examine.

# Cross-Examination by Mr. Bromley.

Q. You told us, Mr. Holland, that when you came with Universal it owned both the Haggerty and the Hite patents, did you not?

A. Yes, I think I did.

Q. And isn't it the fact that after you came with the company you found out that sometime prior to 1928, by a couple of years, the National Company had started to manufacture plaster board and was using, in its manufacture, the Haggerty patent?

A. Yes, sir.

Q. And of course, when you came with the company as you have told us, there was already pending this infringement suit which your Universal Company had brought against the National Company in Buffalo, New York, in the Federal Court, isn't that right?

A. That is my recollection.

Q. And now, don't you remember that when you came to Universal and took charge of its affairs, that as a matter of fact Federal Judge Hazel in Buffalo, had already decided that the Haggerty patent was valid, and infringed, and issued a preliminary injunction against National?

A. Well, you freshen my memory on that as to the details. I think that is right. The injunction, however, I guess was never enforced. That is what I

was thinking about.

Q. Wasn't the fact that the injunction, as you say, was not enforced, due to the fact that the court, as is frequently done, had provided by order that if National put up a large enough bond it could go ahead and manufacture the infringing board?

A. I think that is correct.

Q. So that it is a fact, isn't it, that when you came with the Universal Company, the National Company was making. the infringing board using the Haggerty starch process, but was under a bond in lieu of temporary injunction?

A. I think that is correct.

Q. Now it is a fact, isn't it, that the result of your investigation into the gypsum industry, after you became Universal's president, disclosed to you that probably everybody in the industry was infringing your starch patent?

A. There were people in our company who advised me

in that respect, and thought that that was true.

Q. And as you have said, the Universal Company was in a very precarious financial position, wasn't it?

A. Yes, sir.

Q. Did that have anything to do with the fact that at least prior to 1929 you instituted no other infringement suits than the pending National suit?

1542 A. It had very much to do with it.

Q. Just how bad was your financial condition with reference to the question of whether or not you were able at that time to institute other infringement suits?

A. Well, previous to the receivership proceedings we were trying to accumulate all of our cash resources to make a required payment of interest and principal on a bond issue that was outstanding, as I remember it something in the

amount of \$55,000 semiannually. So that we were trying to accumulate all our cash for that payment to avoid a receivership.

After the receivership, we were limited in our funds and could only have provided them by the issuance of receivers'

certificates, which we were trying to avoid.

Q. By the way, do you recall that you were appointed receiver on or about April 22, 1929?

A. Yes, sir.

Q. Now was it the fact that you did not institute other infringement suits on the Haggerty patent because you considered that your financial position was not sufficient to justify the expenditure of the money to sue others?

A. That was a major influence.

Q. How long—while I am on the subject—did the receivership last? You have said it started in April, 1929. When were the receivers discharged, do you remember?

When were the receivers discharged, do you remember?

A. I think in the early part of 1935. I answered that question yesterday, I think. I am a little un-

certain as to the dates.

Q. So that when you went to this Palmer House meeting in May, 1929, you were a fully-qualified receiver of the Universal Company, weren't you?

A. If that was the date of the meeting, yes.

Q. Well, it certainly was sometime in the summer of 1929, and I thought you agreed with Mr. Knuff that it probably was in May, 1929, at the Palmer House?

Justice GARRETT. Mr. Knuff thought it was in July.

The WITNESS. That is right

### By Mr. BROMLEY.

Q. Well, I guess your testimony was that you didn't know whether it was in May or July?

A. That is right.

Q. Well, whenever it was, isn't this the fact, that at that meeting the USG Company offered to your company and others a license under a new process called the "foam" process, which had not heretofore been licensed by USG to anybody, or indeed disclosed to anybody?

A. Yes, sir.

Q. And wasn't that the purpose of the meeting, that is to say, to disclose this new process called the foam process, and to offer to such persons as might be interested, a license under that new process?

544 A. That is my remembrance.

Q. And do you recall that you were told at that

time that the invention was in the application stage, that Roos was the inventor, but that no patent had as yet been issued?

A. Yes, I think that is correct.

Q. Now you have told us that you told Mr. Avery, or whoever was there from USG, that your company wasn't interested in taking a license under that new invention—didn't you?

A. Yes, sir.

Q. And isn't it the fact, Mr. Holland, that you went to Mr. Avery and said, "I don't see any reason why I should take a license under one of your patents when I am convinced that your company is violating one of my patents"?

A. Well, I don't remember those exact words, but I think at that time I began confronting him with the idea that

USG was infringing our patents.

Q. Can you recall whether you said that, or the substance of that, to Mr. Avery, at the meeting, or at some time subsequent to the meeting?

- A. I cannot recall for sure.

Q. Well, subsequent to the time that you told him that, did you have other meetings with him with respect to this claim which you had asserted against USG that it was infringing your Haggerty patent?

A. Yes, sir.

Q. And out of those negotiations there grew the agreement whereby USG was to purchase the Haggerty and Hite patents, didn't there?

A. Yes, sir.

Q. And when that contract, Government's Exhibit 6, was executed, it was by you submitted for approval to the Federal District Court which appointed you, as well as the six other Federal District Courts in which ancillary proceedings were pending, isn't that the fact?

A. That is right.

Q. And it was approved by all seven Federal District Courts on November 5, 1929, was it not?

A. I am not sure as to that date, but approximately, as

I recollect, at that time.

Q. And that contract, then, became effective upon approval by the Federal Courts—do you remember that?

A. That is my recollection.

Q. And that contract provided for a license to your company under a number of patents listed in schedules annexed thereto, did it not?

A. Yes, sir.

Q. And it included the new foam invention as well as the Haggerty and Hite patents which USG had purchased from you as receiver?

A. That is my remembrance.

Q. Now the negotiations which were carried on by you and Avery were not participated in, were they, by any representative of any other company in the industry—I am talking about the purchase of the Haggerty and the Hite patents, now.

A. No, I don't believe so.

Q. That was a matter which had to do with USG only, and the Universal Company only, was it not?

A. Yes, sir.

Q. Are you able to tell us whether or not the result of that purchase was or was not financially advantageous to Universal?

A. It is my opinion that the sale we made was a good one and provided Universal with substantial sums which were very helpful in bringing about a reorganization and a removal of the receivership.

Q. In other words, you considered at that time, and do now, that you made a very favorable deal for the sale of

those patents, is that correct?

A. Yes, sir.

Q. And it yielded the company a very large sum of money, didn't it?

A. Yes, sir.

Q. I wasn't clear with respect to one of your answers.

Mr. Knuff suggested that the charge that you made

1547 'against Mr. Avery, as I recall it, was that his bubble process infringed your Haggerty patent. Now isn't it the fact that that wasn't what you complained of, but rather your charge against USG was that USG's use of starch infringed your Haggerty patent?

A. I think my answer merely stated that the USG was infringing the starch patents. I do not think that in my

answer I referred especially to the bubble patent.

Q. Well, that is what I wanted to clear up because, as I understand it, while the foam process was for the purpose of obtaining a light-weight board, and starch had some effect in that direction, there was no conflict between the two patents, and that your claim was that USG was infringing because it used starch in its board which, it will later be developed I think, was for the purpose of getting a good bond between the paper and the core. At any rate, we now have it that your position was that USG was in-

fringing Haggerty because it used starch. That is right, isn't it?

A. That is my remembrance, yes.

Q. Now you have told Government counsel on your direct examination that you talked with various board manufacturers from time to time about the question of their settling with USG and taking licenses. You knew, did you not, from these talks, that some of the wallboard manufacturers who did not have licenses were trying to get a settle-

ment of the damage and infringement claims which USG had against them, on a basis more favorable

than the basis contained in your contract?

A. Well, I don't know that I knew that definitely. That was rumored in the industry that that was so, and that was one of the things that I was curious about in my prowling around among the members of the industry.

Q. In other words, you were curious to find out whether USG was going to accord these others a more favorable basis to settle the damage claim than you had been able

to get in your license, is that what you mean?

A. Yes, I think that would have been interesting for me

at that time.

Q. Did you also learn from your talks that some of these others who had not taken licenses were trying to avoid the obligation which you had assumed of paying royalties up to 1937?

A. Well, I am not sure that I knew that, I might have

heard that.

Q. Well, you recall, do you not, that under your license agreement your company had to pay royalties up until the expiration of the Utzman machine patent which not expire until February 10, 1937?

A. I don't recall that now.

Q. I think the exhibit in evidence will show that.

Do you recall that your license had what lawyers sometimes call a most-favored-nations clause in it?

1549 A. I believe that is right.

Q. And the effect of that was, was it not, to provide that if anyone else in the industry got a more favorable contract, you should be entitled to it likewise?

A. Yes.

Q. Well, you know, Mr. Holland, as a matter of fact that at no time while you were with the Universal Company did USG ever recede from its position that anyone who wanted to take a license would have to pay the full amount of the damages, and take a contract which obligated it to pay royalties up to February, 1937?

A. I knew of no exceptions.

Q. Now did you know of, or ever obtain any knowledge of any kind, of any agreements or understandings which any of these new licensees who came in, in May, had with the USG in connection with the execution of the licenses which were signed by National, Certain-teed, Niagara, and Ebsary in May 1929?

A. You mean other than were in the agreements? Q. Yes, sir.

Q. Yes, sir. A. No, sir.

Q. Did you ever have any understanding yourself, as a part of any May settlement, or as a part of the settlement of infringement claims, in addition to the provisions contained in your own license which was then outstanding?

1550 A. No, sir.

Q. When you became president of the Universal Company, did you learn of, or were you told of, any agreements or understandings which Universal had with USG or anyone else, which were outside of the existing written license agreement of 1926?

A. Not that I remember of.

Q. And were you ever told of any understanding or agreement with USG or anyone else with respect to plaster prices, or the prices of other unpatented products?

A. No, sir.

Q. Now you have told us that when you entered the industry in February, 1928, prices on all gypsum products

were very low, is that right?

A. I think I said that the market condition was very chaotic, and that prices were going down rapidly. You ask as to February, 1928, and I don't remember just how low they were at that time.

Q. When you say "chaotic", you mean among other things that there was wide divergence in the prices as between

various localities?

A. And dates. Q. And dates?

A. Yes, sir.

Q. By the way, was that something of which your customers, the dealers, were complaining?

1551 A. Yes, very much so.

Q. And you also said that litigation in the industry, as of the time you came in and afterwards, was extensive, and you have referred to several pending suits. Did you make a report to your stockholders, can you recall, in connection with this situation in the industry?

14.14

A. Yes, I think in my annual report to the stockholders I did.

Mr. Bromley. Will you mark his document for identifi-

cation, please, as Defendants' Exhibit No. 2?

(The document referred to was marked as Defendants' Exhibit No. 2, for identification.)

By Mr. BROMLEY.

Q. I show you Defendants' Exhibit No. 2 for identification, and ask you whether that is the original of a report signed by you to the stockholders of the Universal Company.

A. Yes, sir.

Justice STEPHENS. Let the Court have a little more time, Mr. Bromley, we haven't finished reading it yet.

All right, proceed.

By Mr. BROMLEY.

Q. In Defendants' Exhibit 2 for identification, on page 3. I notice a reference to a proposed consolidation of smaller interests, which is contained in the third whole para-

graph from the top, beginning, "Perhaps, however". 1552

Was it your view, Mr. Holland, that the Universal Company's position was uneconomic because of the nature of the business and the fact that it did not have a broad geographical coverage, plant-wise?

A. Yes, sir.

Q. And did you think there were other companies in the industry subject to the same handicap?

A. Yes, sir.

Q. And did you therefore interest yourself in the proposition of attempting to bring about a merger of various companies like yours in the industry?

A. Yes, sir. Q. Reference is made in that paragraph to a substantial banking connection. To what did that refer?

A. Blair & Company of New York City.

Q. They were private bankers, engaged in the business of underwriting securities in industry, weren't they?

A. Yes, sir.

Q. And had you conceived, and were you working on, a plan in 1928 and 1929 at least, to bring about a consolidation of some of the companies in the gypsum industry, with the aid of Blair & Company?

A. Yes, sir.

Q. What companies had you approached or had you in mind?

A. Any or all of them with the exception of the 1553

United States Gypsum Company, that could be economically

put together.

Q. Was your proposal or plan in anywise connected with a plan of merger which it has been testified here Mr. Griswold was interested in?

A. No, but it included his company, that is we were going to make an effort to include his company. I didn't pay much attention to Mr. Griswold because he really was not in control of the American Gypsum Company policies at the time, in my opinion.

Q. By the way, you said the other day something about some of your directors not thinking much of Mr. Griswold.

Was one of your directors Mr. E. A. Webber?

A. Yes, sir.

Q. And was he a partner in the banking house, the name of which was True & Webber, of Chicago?

A. Yes, sir.

Q. And it is your recollection that some of Mr. Webber's feeling toward Mr. Griswold might possibly have been accounted for by the fact that Mr. Webber had to give Mr. Griswold \$50,000 in connection with Mr. Griswold's merger plans?

A. I think, sir, the story that I heard on it was that Mr. Webber's company had paid \$50,000 to the American Gypsum Company for an option to purchase, and the option was

not exercised, and that they thereby lost \$50,000 to

1554 the American Gypsum Company.

Q. And it thereby created some bad feeling between Mr. Webber and Mr. Griswold, is that right?

A. I think so.

Q. And that is what you had reference to the other day?

A. Yes, sir.

Q. Now for how long a time, if you can recall, were you concerned with your attempt to bring these companies

together into a larger unit?

A. Well, I spent a great deal of time on it in the fall of 1928 and the early part of 1929, but at all times I was confident that that was the best "out" for the Universal Company, so I exposed myself to any opportunity for conversation along that time practically all the time I was in the industry.

Q. But these plans with which Blair & Company had a connection, did they come to an end with the financial

collapse in 1929, or did they not?

A. Well, it seems to me that they came to an end before that. We had another reorganization plan at about the time of the collapse, which fell through, which did not contemplate a merger. I am not sure when Blair & Company's interest stopped.

Q. Was Mr. George M. Brown active and interested in the working out of either one of these plans for a con-

solidation?

1555 A. Yes, he was interested in the Blair attempt.

Q. And there were several, if not many, meetings, were there not, in connection with this Blair plan of consolidation, during 1928 and 1929?

A. Between different ones of us or all of us together?

Q. Between different ones.

A. Yes.

Q. And the plan got far enough along, didn't it, Mr. Holland, so that you felt that if it should succeed you were reasonably assured of being placed in charge as president of the new consolidated company?

A. They had led me to believe that, yes, sir, meaning

Blair & Company.

Q. And this Mr. Elisha Walker, whose name has been mentioned here as being connected with Certain-teed, was a partner in the firm of Blair & Company, was he not?

A. Yes, sir.

Q. And he was also on the Board of Directors of the Certain-teed Company?

A. Yes, sir. Q. Now is it the fact, Mr. Holland, that in connection with this merger idea of yours, you concluded that it was advantageous, at least, to bring about a settlement of the lawsuits pending in the industry over patent infringements?

A. Yes, sir.

Q. And did you also think that it was important in connection with your merger plans to eradicate the dissension in the industry and the bad feeling, if you could?

A. Yes, sir.

Q. I notice in Exhibit 2 for identification of the defendants, again on page 3, a reference in the first whole paragraph, near the top of the page, to the Federal Trade Commission.

A. Yes, sir.

Q. At that time is it the fact that you found out that. the Federal Trade Commission had a definite and widelypublicized policy of calling conferences in industries, described as Fair Trade Practice Conferences?

A. Yes, sir.

Q. And you found out, didn't you, that that move was led by Commissioner William E. Humphrey, then a member of the Federal Trade Commission?

A. I believe so, yes, sir.

Q. And that for a considerable period of time prior to 1929, Commissioner Humphrey had been going around the country, presiding at industry meetings at which Fair Trade Practice rules were drawn up and approved by the Commission—didn't you learn all that in 1928?

A. Yes, sir. I am not sure as to the date, as to the time I got that information, but it was 1928 or 1929, somewhere

along there.

Q. Well, it was as early as the summer or fall of 1928, wasn't it?

A. I believe so.

Mr. Bromley. Will you mark this document entitled "Release" as Defendants' Exhibit No. 3 for identification? (The document referred to was marked as Defendants' Exhibit No. 3, for identification.)

### By Mr. BROMLEY.

Q. I show you Defendants' Exhibit No. 3 for identification and ask you whether you can identify that as a copy of the Fair Trade Practice rules which were adopted by the gypsum industry and approved by the Federal Trade Commission.

A. Yes, sir.

Q. Now it is a fact, isn't it, Mr. Holland, that as a result of your efforts a trade practice conference was held in the Waldorf-Astoria in March, 1929?

A. I took a lot of credit upon myself for bringing that

about, yes, sir.

Q. And most everybody in the industry was there represented, isn't that so?

A. That is my remembrance.

Q. And the conference was presided over by Commissioner William Humphrey of the Federal Trade Commission, was it not?

A. I don't remember that, I remember Mr. Flan-

nery.

Dy the conference that was held in the Waldorf-Astoria in March, 1929?

A. Yes, I think so.

Q. And thereafter they were submitted to the Federal

Trade Commission and approved, with modifications which are indicated in the exhibit, isn't that so?

A. That is my remembrance.

Q. Now it is a fact, is it not, that among the rules, Rule 4 on page 3 is a rule which provides that, "The sale of certain products without profit for the purpose of injuring a competitor, or with the effect of lessening competition, is an unfair trade practice"?

A. Yes, sir.

Q. Now that was a very important rule, was it not, in your view?

A. Yes, sir, it didn't satisfy me but —

Q. (Interposing.) And likewise, the same subject-matter is treated in Rule 7, is it not, on that same page, which provides that, "Selling of goods below own cost for the purpose of injuring a competitor and/or with the effect of lessening competition is an unfair trade practice"?

A. Yes, sir.

Q. Now isn't this what you were talking about on your direct examination when you made a reference to your efforts with the Federal Trade Commission?

A. Yes, sir.
Q. Mr. Knuff yesterday referred to Exhibit No. 203 for identification, a letter from Arthur R. Black to John A. Kling.

(Copy of Government's Exhibit No. 203 was handed to

the witness.)

## By Mr. BROMLEY.

Q. Will you look at the second page of that letter, in the eighth line, the sentence beginning, "as you know", and read that sentence, please?

A. Yes, sir.

Q. Now is it true, Mr. Holland, that either at that time or any other time you were a representative of USG?

A. May I hear the question again, please?

(The pending question was read by the reporter.)

A. No.

Q. And did you ever agree, or have an understanding with USG or anyone in that company that you would promote any plan looking toward the licensing of all the industry under price-fixing agreements?

A. No, sir.

Q. Isn't it a fact that on such occasions as you talked with Mr. Avery in 1928 and 1929, you found him somewhat disinclined to discuss the matter of settlement and license?

1560 Mr. KNUFF. The question is objected to as calling for a conclusion.

Justice Stephens. Conclusions are not always objectionable upon cross-examination, Mr. Knuff, if they tend to explain the questions and answers on direct examination. I think the question is proper. The objection is overruled. The WITNESS. May I hear the question, please?

The witness. May I hear the question, please? (The pending question was read by the reportre.)

The WITNESS. He was a very hard man to reach, he rather ignored me most of the time in my efforts to bring about a discussion.

## By Mr. BROMLEY.

Q. Well, isn't it true, Mr. Holland, that throughout this period, 1928, and 1929, whatever you did in connection with license agreements you did acting on behalf of the Universal Company or yourself, and no one else, unless possibly it might be the proposed merger?

A. That is correct.

Q. I wanted you to tell the Court, if you would, please, briefly, what you have been doing since you left the gypsum industry in 1935.

A. Well, immediately following leaving the Universal Gypsum & Lime Company, besides paying some attention to a family-owned company, the Holland Lumber Company,

out in Nebraska and Iowa, I did some professional 1561 work as an industrial engineer on my own, in an

association with Sanderson & Porter of New York, which later led to my taking over the management of their western branch, with headquarters in Chicago. So that for about four years I was in the profession of industrial engineering.

Approximately four years ago I became what in most firms would be considered the executive vice president of the Florence Stove Company, and on the executive committee of two subsidiary companies, the Marshall Stove Company and the Newark Stove Company, and secretary

of one of them.

I am president, and a director, of the American Rock Wool Corporation, an insulation company.

Since my brother's death last spring, I have been presi-

dent of the Holland Lumber Company again.

Q. So that since 1935 you have had a very active life entirely away from the gypsum industry, isn't that true?

A. Very much so, sir.

Q. Now somewhere there is a reference to Dr. Nelson

in one of your reports to stockholders, or otherwise. In Exhibit 202, on the first page, near the bottom, the next to the last paragraph, reference appears as follows, "We now have Dr. Nelson clearing up our entire patent situation for us which involves license agreements with our competitors and settlements of lawsuits pending".

This document was written May 18, 1928, by you to your executive committee. Isn't it a fact that

Nelson was hired on a month-to-month basis by you specifically for the purpose of preparing for trial your Haggerty patent infringement suit against the National

Gypsum Company?

A. Well, I am not sure as to that. At the time I came with the Universal Company this man Nelson was in charge of our research department, and as of the date of this memorandum it was not at all certain that we were going to continue any activity in the way of research. But at that time, as I remember it, I did use Mr. Nelson to educate me on our patent situation. He took an extended leave of absence, took a trip to Europe, and sometime afterwards I think he came back and devoted most of his time to the National suit.

Q. He was a patent expert, was he not?

A. He was very familiar with patents.

Q. He had patents of his own, did he not, in the gypsum field?

A. Yes.

Q. And he was an engineer, was he not? A. He was a chemical engineer, I believe.

Q. And a man highly skilled in the art of gypsum manufacture?

A Yes. We later made him our production manager.

Q. On page 1706 of the record, line 22, in answer to a question as to the character of the competition generally throughout the industry at or about May, 1928, you made this answer:

"Well, I think it was very live competition, everybody was very active, and it was pretty hard for Universal to

sell anything".

Now isn't it the fact, Mr. Holland, that you were not troubled about "live competition" so much as you were with the unusual situation presented by the widespread practice of competitors selling below cost?

A. Yes, not only selling below cost or near cost, but the big divergency of quotations as to different dates. A con-

tract, or an order, was never an order for sure.

Q. You didn't mean by that answer did you, to express objection to normal competition such as exists in most businesses?

A. No, sir, I think that sort of competition is what

has built America.

Q. Now it is a fact, isn't it, that after the execution of the November, 1929 licenses, competition in the gypsum industry and in the sale of the patented products was at all times, while you were in the business, keen and active?

A. Very much so.

Q. And isn't it a fact that even after November, 1929, at all times while you were in the industry, competition has been keen, license or no license, patents or no pat-

A. That is right, very active competition.

Mr. BROMLEY. That is all, sir.

Justice Stephens. Is there any redirect examination?

Mr. KNUFF. I have no redirect examination.

Justice Stephens. Is there cross-examination by any other defendants?

(No response.)

May this witness be excused from the trial?

Mr. BROMLEY. Yes, your Honor. Mr. KNUFF. Yes, your Honor.

Justice Stephens. You may be excused, Mr. Holland, and the Court thanks you for attending here.

The WITNESS. Thank you very much.

(Witness excused.)

Justice Stephens. Announce the recess.

Mr. KNUFF. I wonder if I can't probably save the Court

a little time before the recess is announced.

At the time that Mr. Steffen and I started to prepare this case for trial, we had a very definite plan as to what participation he would take in it and what participation I would take in the trial.

When the Court adjourned a few days before Thanksgiving, Mr. Steffen left and he was confined to his home until Monday afternoon of this week, with a very severe

attack of, I presume, influenza.

1565 Mr. Steffen had made all the preparation up until that time I have presented to the Court. I have about reached the limit of the preparation that I have taken over on the matters that he had intended to present to the Court.

I find that I cannot go forward any further. I have been working from eight o'clock in the morning until eleven

o'clock at night, and Saturdays, Sundays and holidays. I am tired, both mentally and physically. I think that was quite apparent yesterday when I was conducting the direct examination of Mr. Holland that I was slipping mentally when I couldn't remember right from left, and was calling "United States Gypsum", "National". There is just so much I can do, and I am not prepared to go ahead any farther.

However, if the Court feels that we should go ahead, I

will make an effort to continue.

Justice STEPHENS. What is Mr. Steffen's condition of

health?

Mr. Knuff. Mr. Steffen's condition of health is not any better than it was when he came down here—well, I would say it is probably some better, but he is just not up to par.

Justice STEPHENS. Is he here, or is he in Connecticut?

Mr. KNUFF. He was leaving for Connecticut sometime this morning. He was at his home all day yesterday, in bed. My wife went over there yesterday afternoon, late in the afternoon, and he came to my home last night and 1566 had a little bit of something to eat. He is feeling

had a little bit of something to eat. He is feeling

miserable, he has this severe cold —

Justice STEPHENS (interposing). You needn't go into the details. We wanted to know if he is so ill that he can't attend the Court.

Mr. KNUFF. He is very much indisposed. As I said, I will go ahead with the case if the Court desires. I will have to have a little more time to prepare. There are only twenty-four hours in a day.

Justice STEPHENS. Could you, without undue imposition upon your health, if we adjourned now, go ahead tomor-

row so we wouldn't waste tomorrow?

Mr. Knuff. I can attempt to do so. The next witness that we are going to put on is Mr. C. O. Brown, and here is the batch of exhibits upon which we expect to examine him, and I anticipate, of course, that we are going to have the same difficulty with defense counsel as we have had heretofore, and if there is a recess and we had these photostated, I think a great deal of that difficulty or dissension will be obviated during the recess.

However, I will make an effort. I know in a general way what is in that folder, your Honor, but I don't know sufficient about it to go ahead without some more intensive

preparation.

Justice STEPHENS. Well, the Court will announce its plan at the resumption of the session, if counsel

will return at the usual time for the afternoon session. We

will discuss the situation during the recess.

Mr. Bromley. I don't know what Mr. Knuff means by "difficulty with defense counsel." I haven't meant to be difficult.

Mr. Knuff. Well, probably "difficult" wasn't the correct word. I anticipate that there will be the same situation that has heretofore existed.

Justice Stephens. You refer to the need of defense coun-

sel for seeing the exhibits?

Mr. KNUFF. Yes. Probably "difficult" was an ill-chosen word. I didn't mean to cast any reflection upon defense counsel.

Mr. Adams. If Your Honor pleases, I certainly sympathize with Mr. Knuff's position, but in considering the problem which is presented it would be very much appreciated if the Court would also consider the fact that Mr. C. O. Brown is here from Savannah, Georgia, and has been here all week, and naturally is anxious to make his plans, subject to whatever the convenience of the Court may be.

Justice STEPHENS. How many days do you think Mr.

Brown's testimony will take?

Mr. KNUFF. We couldn't possibly finish with Mr. 1568. Brown in less than from two to three days, and nearer three than two.

I suggested to Mr. Brown yesterday—and I will make the suggestion to the Court—that I think that Mr. Brown should probably be re-subpoenaed so that he will get at least two mileages, because we can't expect Mr. Brown to come up here and spend all of his money, and then go back to Savannah, and then come back again.

Justice STEPHENS. The point is, however, that even if he is put on this afternoon or tomorrow, you will not finish with him until after the recess which the Court is forced to

take next week?

Mr. KNUFF. I can definitely assure you that we will not. Justice STEPHENS. Thank you. Is there anything else to be said by any other counsel? If not, you may announce the recess.

(Whereupon, at 12:15 o'clock, p.m., the hearing was recessed until 1:45 o'clock, p.m., of the same day).

## 1582 In the District Court of the United States For the District of Columbia

# Civil Action No. 8017

## UNITED STATES OF AMERICA, PLAINTIFF

v.

United States Gypsum Company; National Gypsum Company; Certain-teed Products Corporation; The Celotex Corporation; Ebsary Gypsum Company, Inc.; Newark Plaster Company; Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company; Sewell L. Avery; Oliver M. Knode; Melvin H. Baker; Bror H. Dahlberg; Henry J. Hartley; Frederick G. Ebsary; and Frederick Tomkins, defendants

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

Washington, D. C., Monday, December 13, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)

You may proceed, gentlemen. Mr. Steffen. Mr. Brown!

Justice STEPHENS. Take the witness stand, Mr. Brown. Thereupon, CLAUDE OLIVER BROWN, called as a witness for and on behalf of the United States, having been first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. STEFFEN.

- Q. Will you state your full name, Mr. Brown, please, for the record?
  - A. Claude Oliver Brown.
  - Q. And what is your address, Mr. Brown?
  - A. Savannah, Georgia. ...
  - Q. What is your business address?
  - A. 1173 Post Office Box, Savannah, Georgia.

Q. Who are you connected with, Mr. Brown, with what company?

A. Dixie Asphalt Products Corporation.

Q. They are located in Savannah?

A. Yes, sir.

Justice STEPHENS. What is that name, Mr. Brown?

WITNESS. Dixie Asphalt Products Corpora-

1586

By Mr. Steffen.

Q. You appear this morning pursuant to subpoena?

A. Yes, sir.Q. Did you also appear before the Grand Jury in 1940?

A. Yes, sir.

Q. At that time pursuant to subpoena?

A. Yes, sir.

Q. How long have you been with your present connection, Mr. Brown?

A. Since July 1, 1938.

Q. Where were you before that, or with what company were you before that?

A. Up until January 1, 1937, with the Certain-teed Products Corporation.

Q. January 1, 1937?

A. Yes, sir.

Q. How long had you been with the Certain-teed Products Corporation?

A. Since approximately 1911.

Q. What were your duties with the Certain-teed Products Corporation beginning in 1911?

A. Trucker.

Q. You started as a trutker?

A. Yes, sir.

Q. What other things did you do for the company? A. Well, I worked in the plants, and then later 1587 joined the Sales Department.

· Q. Along in the years 1925 to 1929, what was your office?

A. Sales Department, General Sales Manager.

Q. You say you were the General Sales Manager, or what was your title?

A. To my memory, it was around 1925 or 1926 that that was my title.

Q. General Sales Manager?

A. Yes.

Q. Who is Mr. L. R. Walker?

A. He was Vice President in Charge of Sales.

Q. Were you an officer during any of this period, 1925 to 1929?

A. I was made an officer somewhere around '28 or '29, I have forgotten the date.

Q. What title?

A. Vice President.

Q. And did you continue in that office-or for what period of time did you continue in that office?

A. Until I left the company.

Q. You were Vice President until you left the company on January 1, 1937?
A. That is right.

- Q. Will you tell us who were some of the other officers of the company during the period from 1588-1925 to 1929?
  - A. Mr. George Brown was President. Q. Is he related to you, Mr. Brown?

A. Yes, sir.

Q. What relation?

A. An uncle.

Q. Who else do you remember? A. Mr. Audenreid Whittemore.

Q. What was his title?

Vice President. Q. Anyone else?

A. Mr. D. C. Cale was a Vice President.

Q. Did you know Mr. Van Hagan?

A. Yes, sir.

Q. Who was he?

- A. He was Gypsum Production Manager, as I remember his title.
  - Q. Did he come from the Beaver Products Company?

Yes, sir.

Q. Did you know Mr. Warren Henley?

A. Yes, sir.

Who was he?

He was, I think, Merchandising Manager, Gypsum Division.

Q. That was during the years 1925 to 1929? A. That is my memory. 1589

Q. Well, did he come from the Beaver Products Company?

A. Yes, sir.

Q. Do you remember when the Beaver Products Company was taken over by Certain-teed?

A. I think it was 1928, but I am not sure.

Q. So Mr. Henley would have come with your company, with Certain-teed, sometime after that?

A. Yes, sir.

Q. Did he continue with the company, to your knowledge, until you left?

A. Yes, sir.

Q. Is he still living, do you know?

A. I understand he isn't.

Q. You understand he is not?

A. Yes.

Q. Did you know Mr. Blagden?

A. Yes, sir.

Q. Did he continue with the company after it took over the Beaver Products Company?

A. To my memory, only a short time.

Q. Now I would like to get straight, if I can, the Presidents of the Certain-teed Products Corporation.

You say Mr. George M. Brown was President—

1590 up until how long?

A. I think late '35 or early '36, somewhere in that period.

Q. Who succeeded him, if you know?

A. Mr. C. E. Rahr.

Q. That is Mr. Chester Rahr? A. Yes.

Q. Had he been with the company before he was made President?

A. Yes, sir. Q. In what capacity?

A. He was Vice President. Q. What type of business, what part of the business was he assigned to?

A. Well, more or less unassigned; I would say miscel-

laneous.

Q. How long was Mr. Rahr in office as President?

A. About a year, as I remember it.

Q. That would carry him to what date?

A. About January 1, 1937.

Q. That is the date that you left your connection with the company?

A. Yes, sir.

Q. Who succeeded Mr. Rahr?

A. I think it was a man by the name of Baumhogger, but he came in after I left.

Q. That is, he came in on January 1, 1937, or thereabouts?

A. Yes, sir.

Q. Do you know how long he stayed in office?

A. No, sir, I do not.

Q. Do you know who succeeded him?

A. No, sir.

Q. Now let's go back to the business of Certain-teed. What were the principal lines of business of Certain-teed from the time that you first became connected with the company until you left in 1937?

A. Well, they originally started as an asphalt roofing manufacturer, but later added paints and varnishes and lin-

oleum and gypsum products.

Q. Could you give us an idea of the relative proportion, when you left the company, of business done in the asphalt division and the gypsum division?

A. I couldn't give you any percentage, no. I don't remem-

ber.

Q. You started, however, as you tell us, in the asphalt business largely. What is that?

A. Asphalt roofing.

Q. What is that type of business?

A. Well, I don't know any other descriptive term
1592 except that. It is applied on houses all over the
country, warehouses. It is a roofing material, waterproofing material.

Q. Did you make shingles, asphalt shingles?

A. Yes, sir.

Q. And how were the asphalt shingles sold?

A. Through dealers and distributors.
Q. Throughout the United States?

A. Yes, sir.

Q. Did you at some time commence making a fiber wall-board?

A. We acquired that business from Beaver.

Q. Did you make something called hardboard?

A. Not to my memory, no, sir.

Q. During the period when you were with the company? A. No, sir.

Q. What do you mean by fiber wallboard?

A. It was a board manufactured from wood pulp and waste paper.

Q. How was it used, Mr. Brown?

A. For temporary partitions and things of that kind.

Q. Could it be used as a plaster base?

A. I never heard of it being used for that.

Q. Now can you tell us when the Certain-teed Company

got into the gypsum business, approximately the year?

A. I think about 1923.

Q. You mean by that—well, explain that. How did you get into the business?

A. They acquired the Acme Cement Plaster Company first.

Q. Where was that located?

A. Well, they had several plants over the country.

Q. The Acme Cement Plaster Company?

A. Yes.

Q. Name one of them.

A. There was one at Acme, Texas.

Q. Now when you say they had several plants, did they manufacture board at several plants?

A. No. sir.

Q. What did they manufacture at the other plants?

A. Plaster.

Q. When did the Certain-teed Company, through its holdings of the Acme Plaster Company, commence making board?

A. I don't remember the date, but I think about '26.

That is just a guess. I don't know, I don't remember.

Q. Perhaps I can refresh your memory. The date, I think—which is not particularly material—was much earlier. I think you acquired the company in 1921, and commenced making board in 1922 or 1923.

Justice STEPHENS. The pleadings show acquisition in

1923.

The WITNESS. That is my memory.

Mr. STEFFEN. That you acquired the Acme Cement Plaster Company in 1923?

The WITNESS. Yes.

Mr. ADAMS. We acquired Acme in 1923. Acme at that time did not have any board plant whatever, and my own recollection is—and I think the witness has properly stated it—that we went into the business of manufacturing board in the latter part of 1926, after the construction of the board plant at Acme, Texas, and that was the only board plant we had.

# By Mr. STEFFEN.

Q. Well, that is your recollection, that it was in 1926 when you commenced making board?

A. Yes, sir.

Q. At the Acme plant?

A. Yes.

Q. What type of board did you make at the Acme plant, if you know?

A. Open-edge board.

Q. And what was your sales territory for the production at the Acme plant?

A. I don't remember. They sold it, I guess, as far as

they could reach at a profit.

Q. Can you tell us about how far that would be?

A. Well, it was sold mostly in the Southern territory.

Q. Will you give us some of the States that that would include?

A. Texas, Oklahoma, Louisiana, Mississippi, and straight across to the Atlantic Seacoast.

Q. Would you reach up into Pennsylvania?

A. I think some board was sold that far north.

Q. Well, at some later period—I think you stated that it was in 1928—the Certain-teed acquired the Beaver-Products Company. Were you familiar with that?

A. I wasn't familiar with the deal. I knew, of course,

that we acquired them.

Q. Could you tell us what plants the Beaver Products

Company had at which they were making board?

A. I think they were making it at Akron, New York; Fort Dodge, Iowa; I am not sure about Grand Rapids, and Sweetwater, Texas.

Q. Grand Rapids, Michigan?

A. Yes.

Q. Sweetwater, Texas?

A. I am not sure about Sweetwater, Texas. They had a - Texas plant, but I don't know where it was.

Q. Was there a plant at Port Clinton, Ohio?

A. Yes, sir, I believe there was. Q. Was there one in Virginia?

A. Yes, sir.

1596 Q. That made 6 plants, all told?

A. I think so.

Q. Do you know why the Certain-teed people bought out

the Beaver Products Company?

Mr. Adams. I object to that. He has stated he doesn't know anything about the deal. Furthermore, I object to the form of the question.

Justice STEPHENS. It seems preliminary, Mr. Adams. It doesn't seem, offnand, to have any relevance to the issues.

What is the purpose of it, Mr. Steffen?, Mr. Steffen. Just a preliminary question.

Justice STEPHENS. Objection overruled.

The WITNESS. I assume to give a more general gypsum coverage, is all I would know.

By Mr. STEFFEN.

Q. Did it give you general coverage?

A. Pretty general, east of the Rocky Mountains.

Q. Can you tell us what type of gypsum board the Beaver Products Company was making at the time Certain-teed took it over?

A. They were making a closed-edge board.

Q. Do you recall whether they had a license with the United States Gypsum Company under which they were making a closed-edge board?

A. I never saw it, but I understand they did.

Q. Do you know approximately when that license agreement was signed?

A. No. sir.

Q. I think I can state, in order that you may get your dates perfectly clear, that that license agreement was signed on July 26, 1926.

A. I would have no way of knowing.

Q. That is the license agreement between Beaver and

United States Gypsum Company.

After the Certain-teed Company had contracted to take over the Beaver Products Company, did a question arise as to whether the Certain-teed Company would take an assignment of the original license between Beaver and USG?

A. I think it did, but I was not in on the negotiations.

Q. Could you tell us offhand what the nature of the question was?

A. No. sir. I don't know.

Q. Well, I will refresh you this far: You were making at your Acme plant an open-edge board, and the Beaver plants were making a closed-edge board.

A. Yes, sir.

Q. Now could you tell us whether a question developed as to whether you were going to make closed-edge board at

your Acme plant, or whether you were going to go 1598 entirely to an open-edge board basis, or whether you

would take some intermediate position?

Mr. ADAMS. I respectfully object to the question as suggestive and calling for a conclusion. Moreover, the witness has stated he had nothing to do with the negotiations. Moreover, I think it is desirable that the witness' recollec-

tion be tested on these specific points. Counsel I don't think should be permitted to make a general statement about what counsel thinks the facts are, and then ask the witness if that refreshes his recollection about something he says

he doesn't know anything about.

Justice Stephens. Well, the Court is permitting certain latitude in leading on preliminary questions, as it saves time. I will be glad to hear you, Mr. Steffen, but I think that this question does transcend the proper limit. It is getting into a controversial and important subject under the issues, and it seems to the Court that you ought to ask the witness the flat question as to what he remembers.

Mr. Steffen. I will be glad to withdraw the question.

Justice STEPHENS. Objection sustained.

By Mr. STEFFEN.

Q. I now show you, Mr. Brown, what has been marked as Government's Exhibit No. 209 for Identification, which purports to be a letter signed by you, addressed to Mr.

Avery, under date of February 20, 1928, and ask

if you can identify the signature?

A. Yes. sir.

Q. Is that your letter?

A. I don't remember the letter, but the signature is mine.

Justice Stephens. Just a moment; let us get these exhibits that the Clerk just brought up straightened out.

Justice Jackson. Are there three sets of those?

Mr. KNUFF. Yes, Your Honor.

Justice Stephens. Exhibit 228, is that in this set?

Mr. Steffen. If you will skip that first photostat, it is the next letter, I think.

Mr. KNUFF. That is not our item number at all, that 228.

I don't know whose it is.

Justice Stephens. That is No. JJ-228. Is it a letter of February 20, 1928?

Mr. STEFFEN. That is right. Justice STEPHENS. Proceed.

Mr. Steffen. I offer Government's Exhibit No. 209 in evidence.

Justice STEPHENS. You identified that as your signature, did you, Mr. Brown?

The WITNESS, Yes.

Justice STEPHENS. Any objection?

Mr. BROMLEY. Only the usual objection, if the 1600 Court please.

Justice STEPHENS. It may be received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Ex-

hibit No. 209, was received in evidence.)

By Mr. STEFFEN.

Q. You state in your letter, Mr. Brown, that Mr. Blagden advises certain things. Did you talk with Mr. Blagden on that matter, do you recall?

A. I don't remember.

Q. I call your attention to the second paragraph of the letter, the second sentence, in which you say it might be "to our mutual advantage" if we were to talk the matter over, and ask you what you meant by "our mutual advantage"?

A. I don't remember.

Q. Let me ask you this, Mr. Brown: How did your company, or how did the management of your company reach decisions on matters of policy? Please describe the practice and technique.

A. I don't think there was any general practice. Mr.

George Brown made most of them.

Q. Were there discussions among the officers?

A. Sometimes there might have been.

Q. Do you recall whether there was a discussion concerning this matter of the Beaver license being taken over?

A. No, sir, I don't recall.

- Q. When you wrote to Mr. Avery, did you write of your own volition, or had there been a discussion, can you remember?
- A. As I read this letter, I think it was possibly written by Mr. George M. Brown and signed by me.

Q. Do you begin to remember that?

A. It is on his private stationery.

Q. It is also signed "Assistant to President". Were you Assistant to the President at this time?

A. For a short period. I don't recall the exact date.
Q. That is, you were Assistant to the President?

A. For a short time.

Q. For how long, a year?

A. I don't remember the exact time.

Q. What I want to get at, Mr. Brown, is whether or not you had any discussion with Mr. George Brown concerning this matter of the things that you were going to take up with Mr. Avery as related in this letter?

A. I don't recall it, and so far as I know that meeting never took place.

Q. Your testimony would be that you did not go to

Chicago?

1602 A. That is right.

Q. How do you remember that?

A. Because I wasn't in on any of those negotiations.

Q. I am asking you how you remember whether you went to see Mr. Avery or not?

A. The statement just made, that I had nothing to do

with it during any of the period.

Q. I would like to show you Exhibit No. 195, and Exhibit No. 196, in order to refresh your recollection on this point. Are you looking at Exhibit No. 195 now?

A. Yes.

Q. Does that refresh you as to whether or not you were in on this discussion?

A. I don't remember it.

Q. Would you look at Exhibit No. 196, which is a wire from Mr. Avery to Mr. Blagden, in which your name is mentioned?

Mr. BROMLEY. I object to the use of a telegram that was neither sent nor received by the witness, in an attempt to refresh recollection. Obviously it can have no such effect.

Justice STEPHENS. Well, we think that is not well taken, Mr. Bromley. It may or may not have such an effect. An event or a telegram, even though it doesn't go between these

two parties, may possibly refresh his recollection. If it doesn't, he can say so. You understand, Mr.

Brown, that if you don't recollect anything or if a particular thing shown you does not refresh your recollection, you are free to say so.

The WITNESS. Yes, sir.

Justice STEPHENS. Objection overruled.

By Mr. STEFFEN.

Q. Does that refresh your recollection, Mr. Brown, concerning your part in these negotiations?

A. I don't remember ever seeing this telegram before. Q. Did you talk with Mr. Blagden about this telegram?

A. No, sir.

- Q. Did you actually go to Chicago on this occasion?
- A. I am quite sure I didn't.

  Q. Why are you quite sure?

A. Because I never even saw the telegram.

Q. But I want to know why you are quite sure that you

didn't go to Chicago? You could go to Chicago whether you saw the telegram or not.

Mr. BROMLEY. I object to that as repetitious. He has

told us several times why he remembers that he didn't go. Justice STEPHENS. That objection is well taken. The witness has stated several times that he did not ever see Mr. Avery on the subject of these negotiations.

Objection sustained.

1604

By Mr. STEFFEN.

Q. I now show you, Mr. Brown, for purposes of refreshing your recollection, what has been marked as Government's Exhibit No. 210 for Identification. This purports to be a memorandum of a conference held in the offices of the Certain-teed Products Company on February

Mr. ADAMS (interposing). May I inquire what his recol-

lection is being refreshed about now?

Justice Stephens. Let me examine the exhibit, Mr.

Adams.

Mr. ADAMS. If Your Honor please, before Your Honor completes the examination of that exhibit, I might have occasion to make some remarks with respect to that exhibit, also.

I would like to know what the purpose of the use of this memorandum is, and I respectfully request that the Court instruct counsel to answer both those questions now. First, what is his recollection being refreshed about? There is no question pending. Secondly, what is this memorandum going to be used for, and is it going to be offered in evidence?

Justice Stephens. Have you any objection to answering

those questions, Mr. Steffen?

Mr. Steffen. The memorandum is being offered to refresh Mr. Brown's recollection concerning any part that he took in the negotiations. I perhaps should ask a question, and I will ask him if he attended the meeting described in this memorandum dated February 2. 1928?

Mr. ADAMS. Then may I be heard, Your Honor?

This witness is being shown a memorandum of a conference on February 2, 1928. As I understand it, the proper procedure—I have authorities that I would be glad to submit to Your Honor on this point—is this: First, as to any fact it is necessary that it be ascertained whether or not the witness could have a recollection, that is to say, whether he was so situated at the time the alleged occurrence took place that he could have a recollection with respect to those facts. Next, whether or not he has a recollection. In other words, he has to be asked whether or not he knows the facts, without reference to anything. If he says he does, he is to be examined as to his recollection. If he replies that he does not recall, then he may be shown a document and asked if that document refreshes his recollection as to the facts. He may then reply as to whether it does or not. If it does not, that is the end of the inquiry. If it does, he may then state what his recollection is, so refreshed.

Now here—this is typical of the procedure followed by the Government in this case—Mr. Brown is shown a memorandum. He is asked—"Does that refresh your recollection

as to whether you attended that conference?" You

1606 can see the vice in it at once.

He hasn't been asked if he was situated where he could have gone to the conference. He has not been asked whether the conference ever took place and whether he has any recollection of it. And he has not been asked anything along that line in order to qualify this document to be used, as a memorandum, to refresh his recollection.

Now the practice furthermore, it seems to me, puts an extremely unfair burden on this Court. The Court here are the triers of the facts. They are also the triers of the law. They are the jury and the judge. In this case they are being repeatedly handed up, in advance, documents which pertain to vital matters in this case which the Government knows are not admissible in evidence, and which can not be admitted in evidence. The Court then, as in this instance just before us, necessarily reads the document. That places the Court in the difficult position of having once read the document, absorbed into the minds of the Court what the facts are in the document, whatever statements have been made, then the document is not offered in evidence. The witness may testify it never refreshes his recollection and can not refresh his recollection, but nevertheless by an indirect method there have been placed in the Court's mind a number of statements which are not otherwise admissible in evidence.

Now the authorities are clear, and I would be glad 1607 to submit authorities, on that point, that that is a bad practice. Mr. Justice Holmes once observed that jurors are not psychoanalysts. The Court here is sitting in a capacity of jurors, and while this may be somewhat of a delicate position it seems to me that it is necessary for me to state that in our judgment this is placing an extremely unfair burden on this Court, requiring, at the end of a case containing some 2,000 exhibits, the Court to try to separate in its mind, or in its collective mind, rather, a number of impressions with respect to facts which never went into evidence and which the Government knows can not go into evidence. I think that this method of endeavoring to get this type of material before the Court is unfair, contrary to law, and should be stopped.

Justice STEPHENS. Well, unless you wish to be heard, Mr. Steffen, the Court will rule as follows-do you wish to

be heard?

Mr. Steffen. I would like to know which way you are

going to rule. [Laughter.]

Justice Stephens. Well, you will have to take that chance unless you want to be heard. I want to give you an opportunity to be heard, but I can't prophesy as to my ruling. I might change my mind if I hear you.

Mr. STEFFEN. With that warning, perhaps I had better

be heard.

1608 I would say that we expect to offer this memorandum in evidence, which will meet, of course, Mr. Adams' principal objection. And I will also say I think it is clearly admissible in evidence. We haven't asked the preliminary questions yet which will, of course, lay the groundwork. But I wish to use it as a preliminary matter in order to refresh the witness' recollection. I have asked a broad question, and he has already testified two or three times that he has no recollection of meetings or negotiations.

Justice Stephens. Well, the Court spoke as quickly as it did-it always wants to give counsel on both sides opportunity to argue any matter—but the Court spoke as quickly as it did because it seems to the Court that the matter is very clear. Mr. Adams is right in this respect, that you should first ask the witness, Mr. Steffen, if he has a recollection upon a particular subject. Sometimes it is desirable also to ask him, depending upon the circumstances, whether he was in position to be at a certain meeting, and indicate whether or not he could have a recollection. should ask him preliminarily if he has a recollection, and if he has ask him for that, rather than use the document to refresh it, because if he has a recollection you don't need the document.

If he answers that he has no recollection, then you can use the document to see if it refreshes his recollection.

To that extent Mr. Adams is correct, and to that extent Mr. Adams' objection is sustained. You should probe the witness' own recollection before

you presume to use the document.

Otherwise, Mr. Adams, the Court thinks your objection is not well taken. The Court is necessarily dependent to a large extent upon the good faith of counsel with respect to presenting matters to the Court which may never be admissible in evidence. So far it doesn't seem to the Court that the Government has transcended the proprieties in that respect. Practically all of the exhibits offered thus far have been received in evidence. There have been one or two which we have rejected.

In addition to that, of course, if the Court was sitting with a jury, any impressions which the Court received on the facts from offered evidence not received would be immaterial, but here we have to depend upon our own ability to discriminate between what has been offered and rejected, and what hasn't, because if we don't look at it we can't tell whether to receive it in evidence or not. Obviously we have got to read an exhibit before we can see whether

it is admissible.

It may, true, create some impressions upon us that, if we reject it, perhaps we shouldn't have received; but we are supposed to be able, as experienced judges, to reject those, and we will do our best to do so.

In addition to that, we expect to re-read, before 1610 this case is decided—we are reading the transcript as it goes along-and we expect to read an abstract of the transcript and of each exhibit. To that extent your objection is overruled.

Mr. ADAMS. I want to make it perfectly clear, Your Honor, that my objection did not go, and was not intended to be addressed, to any document which is to be offered in evidence. I quite agree that Your Honors can't, obviously, rule on whether a document is admissible -

Justice Stephens. Even with respect to a document which is intended to refresh recollection, if adverse counsel object that it may not be able to refresh recollection,

how can the Court rule on that without seeing it?

Mr. Adams. At that point the Court may look at it, and I think the cases so hold, may examine the document and make the ruling. But-I may be wrong here-but certainly in my experience the practice has always been that a document that was to be used to refresh the witness' recollection was simply something between the counsel and

the witness, and it never came to the Court's attention until some issue arose as to whether that matter contained in the document could or could not properly refresh the witness' recollection.

But I wish to reemphasize that I was not — Justice STEPHENS (interposing). This is to be

offered in evidence in any event, apparently.

Mr. ADAMS. That was the reason for my inquiry originally, and I don't make this objection with respect to anything that is to be offered in evidence. But I think counsel should be limited and not be permitted to say, "I intend to offer this thing in evidence", and thereby evade the

rule.

Justice STEPHENS? Well, the Court has been in one sense, Mr. Adams, trying to save time here. This case has voluminous exhibits. As they have been handed up to the bench, the Court has assumed that they would be, most of them, offered in evidence or used for some legitimate purpose, and in the interests of saving time has tried to examine them in the course of the preliminary questioning of the witness. If you seriously object to the Court looking at a document which may not be offered in evidence, you will have to make your objection to each document as it arises.

I think the objection is strained, Mr. Adams. I don't think we are going to be harmed by considering these various exhibits as they are presented to us. We can't always differentiate, at the moment when we consider them, as to

whether they are coming in or not.

Mr. ADAMS. No. I don't, of course, want to press this objection too far. The reason that I have taken the time that I have this morning is because I think the Government has fallen into a bad practice, and I thought it was

1612 time to call a halt. There is no question about my confidence, and the confidence of everyone, as to the Court's ability to examine the exhibits. What I have been objecting to is putting the Court in an unfair position with

respect to them.

Justice STEPHENS. You are quite within your rights in making your objection, but I think the Government is now advised that it ought to conduct the examination in the manner in which we have indicated, and there will probably be no further trouble.

Ask this witness, if I may suggest, Mr. Steffen, whether he has any recollection of being at the meeting, or whether he was an officer of the con pany at the time of this alleged meeting and whether he recollects being at it. If he does not, then try to refresh his recollection.

Mr. STEFFEN. I think we have developed that he was an officer at the time; and the question, then, Mr. Brown, is—do you recall having attended a conference on or about February 2, 1928, at which the question came up of whether the Certain-teed people would take over the Beaver board licenses and make a closed-edge board at your Acme plant?

The WITNESS. I don't remember such a meeting.

## By Mr. STEFFEN.

Q. Would it have been possible for you to have attended such a meeting?

A. This memorandum would indicate that I did.
Mr. Adams. I object to that, and just in passing indicate that that is——

Justice Stephens (interposing). That may go out. Be careful, Mr. Brown, in answering questions, to answer those which you can correctly answer yes or no, by a yes or no answer. You can answer that last question yes or no. Of course, you are not required to do that where that would be an ambiguous or an unfair answer.

Read that question to the witness.

(The last question was read by the reporter.)
The WITNESS. It would have been possible.

# By Mr. STEFFEN.

Q. Can you tell us what your position was, your personal position, upon the matter of whether Certain-teed should go to the manufacture of a closed-edge board at your Acme, Texas, plant?

A. It is my memory that I favored going to a closed-

edge board. Q. Sir?

A. It is my memory that I favored going to a closededge board. You asked me at the Acme plant, did you not?-

Q. That is right.

A. That was a Certain-teed plant.

Q. That is right.

What were your reasons for taking that position, Mr. Brown?

A...lt was a better product.

Q. Do you recall what the royalty provision of the Beaver license agreement was, as respects the manufacturers of open-edge board?

A. No, sir, I don't know anything about their agreement. Q. Well, the problem at this time, I believe you have testified, was whether or not Certain-teed would take over their agreement; is that correct?

Mr. ADAMS. I don't believe there was any such testi-

mony, Your Honor.

Justice Stephens. The witness testified that there was some question as to whether it would be taken over. I think the statement is not substantially incorrect.

What is the question, Mr. Reporter?

(The pending question was read by the reporter.)

Justice Stephens. Is that correct, Mr. Brown? Just answer from your own recollection, so far as you can, without reference to that exhibit. That has not been shown to you, as the examination is now proceeding. Just give us your own recollection, if you have one. If you haven't, say

The WITNESS. I remember none of the details, Your Honor.

1615

# By Mr. STEFFEN.

Q. What do you remember, Mr. Brown?

A. The only thing I recall is that there were discussions.

Q. Could you tell us how many?

A. No. sir.

Q. Could you tell us over what period of time?

A. No, sir.

Q. But there was more than one discussion?

A. I don't know, sir.

Q. You stated that there were discussions, is that correct?

A. There possibly was more than one.

Q. How could you remember who held those discussions?

A. No. sir, I don't remember.

Q. Who did you have in mind when you said that there were discussions?

A. I assume the officers of the companies. Q. Well, is that what you had in mind?

A. I don't remember a thing about the meeting.

Q. You are speaking now of this meeting of February

A. Or any of these negotiations.

Q. I see.

I would like to ask you some questions now concerning the memorandum of February 2. I believe you have testified concerning Mr. Whittemore, or have you? Who

1616 was he?

A. He was a Vice President.

Q. And Mr. L. R. Walker?

A. He was a Vice President.

Q. And Mr. R. M. Nelson, I don't think you have spoken of him.

A. I think he carried the title Secretary and Treasurer at that time.

Q. And who is L. D. Adkins?

A. I think he was counsel.

Q. And S. W. Chaffee?

A. He was counsel.

Justice STEPHENS. Where does the date of that asserted meeting appear in that memorandum?

Mr. Steffen. Right in the heading, Your Honor, "Conference held February 2."

Justice STEPHENS. I see.

By Mr. STEFFEN.

Q. Did you prepare this memorandum?

A. No, sir.

Q. Do you know who did prepare it?

A. No, sir.

Q. Do you know what item number EE-5 means? You will notice it at the top in the upper right-hand corner.

A. No, sir, I don't.

1617 Mr. STEFFEN. I now ask Mr. Adams if he can enlighten the Court on what Item No. EE-5 means in connection with this exhibit?

Mr. Adams. Yes. That is an item number, which, as I understand it, was put on the document at the time it was subpoenaed by the Grand Jury. That is my understanding. I was not in this case at the time.

Justice STEPHENS. Put on by whom?

Mr. Adams. By either Certain-teed or its counsel, I don't know which.

1618 Mr. Steffen. That is our understanding, likewise.

I now offer Government's Exhibit No. 210 in evidence, as being a document prepared by, and taken from the files

of Certain-teed Products Company.

Mr. ADAMS. I respectfully object. In the first place, the witness has stated that he did not prepare it and does not know who prepared it. Secondly, I can also state that neither do I know who prepared it, or anything about it,

and I suggest that it is not a document which has been identified in any other way except that it happened to be in the possession of Certain-teed.

Justice STEPHENS. Well, let the Court read it.

Mr. Adams. If your Honor please, might I ask a preliminary question of the witness about this document?

Justice STEPHENS. Yes.

Mr. Adams. Mr. Brown, do you have this Exhibit 210 before you?

The WITNESS. Yes, sir.

Mr. Adams. Mr. Chaffee was one of your lawyers?

The WITNESS. Yes, sir.

Mr. Adams. Mr. Adkins was another?

The WITNESS. I am not familiar with Mr. Adkins.

Mr. Adams. Well, Mr. Chaffee was the lawyer generally retained by your company to advise the company?

The WITNESS. That is right.

Mr. Adams. And if he was present at any such meeting, he was there in his professional capacity?

1619 Mr. STEFFEN. I object to that, your Honor. I don't know how this witness could even answer it in

the first place.

Justice STEPHENS. Well, the witness, having been vice president of the company, may know or may not know whether or not this lawyer was called to these meetings in his professional capacity. Do you know?

The WITNESS. I do not know, your Honor. I assume so,

that is all.

Mr. Adams. Was he consulted in any other capacity than a professional capacity?

The WITNESS. Not to my knowledge.

Mr. ADAMS. And he was the lawyer for the company?

Mr. STEFFEN. I object to that line of questioning on the ground that it calls for a conclusion. What is the submission of an item to a lawyer in his professional capacity, and in his business capacity, is a question for the Court.

Justice STEPHENS. What are you trying to do, lay a foundation to show that there is someone else who could

identify this exhibit?

Mr. ADAMS. No, I am about to raise the objection, your Honor, that this document has to do with a conference between the Certain-teed Products Corporation and its counsel, that what went on at that conference is a privileged matter, and Mr. Chaffee, as the witness has stated, was

counsel for the company and was there at the meet-1620 ing. Mr. Adkins—may I ask one more question?



Does it refresh your recollection any if I suggest that Mr. Adkins was connected with the Cravath firm, as to who he was?

The WITNESS. No, it wouldn't.

Mr. ADAMS. You remember generally that there was a lawyer named Adkins?

The WITNESS. That is right.

Mr. ADAMS. I am in a position to prove, your Honor, that at that time Certain-teed was advised by the Cravath firm, and that Mr. Adkins was associated with that firm.

Now my point here is, and I will be very happy to submit authorities to your Honor on this point, that what went on at this conference comes within the rule of privileged communications between lawyer and client. The rule generally stated by Professor Wigmore is that where legal advice of any kind is sought from a professional, legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

The protection is not waived, and I here assert it on behalf of Certain-teed Products Corporation, the client in this case.

Justice STEPHENS. I would like to hear you a little further on one aspect of the matter, Mr. Adams. Do 1621 you contend that every discussion at which a lawyer is present, a lawyer for a company is present, is privileged?

Mr. Adams. It seems perfectly clear under the cases, your Honor.

Justice STEPHENS. Oh, no, that is not the rule, Mr. Adams. The character of the discussion must be of a confidential nature, it must be something that is not communicated to other persons.

Mr. Adams. That is right, it must be a discussion which is related to the business of the client, and which has to do with matters which are, or could be, confidential. Whether the client may later disclose it voluntarily, that fact may be proved, and what the client later discloses may be proved. But what happened between him and his lawyer can never be disclosed if the client objects.

Justice STEPHENS. It doesn't seem to me yet clearly to appear that this man was present for the purpose of

advising the client in respect to the matters set out in this

memorandum.

Mr. ADAMS. If your Honor please, you will find, if you will continue to read it, that the third paragraph on the second page shows definitely that there was legal advice given right at that conference.

I just want to remind your Honors that in having this discussion I don't want to in any way suggest that this

has been properly identified.

1622 Justice STEPHENS. The Court will be in recess for five minutes.

(Whereupon, a short recess was taken, after which the

trial was resumed.)

Justice Stephens. We will hear you briefly, first, Mr. Steffen, on the question of whether or not this is sufficiently.

identified to be introduced in evidence.

Mr. Steffen. I will say that we have identified it as having the names of the officers of the Certain-teed Products Company who would normally handle matters of the sort that are discussed here.

We have, in addition, identified it as being a document which has come from the files of the Certain-teed

Products Company.

Internally the document discloses that it has to do with matters concerning the Beaver license, a problem which the

witness has testified was being discussed.

On the legal question, I don't think we have called your Honor's attention to it, but I assume that you are familiar with 28 U. S. C. A., Sec. 695, and that, it seems to us, is almost controlling in this matter. If your Honor would like, I will read it.

Justice STEPHENS. Read it.

Mr. Steffen (reading). "In any court of the United States —"

Justice Stephens (interposing). You are referring to the past recollection recorded statute?

Mr. STEFFEN. No, this refers to a document which is taken from the files or possession of another party having

to do with a business transaction.

"In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business,

and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All of the circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of any kind."

And in the case of Ulm v. Moore & McCormack Lines, 117 Fed (2d), 222—the original citation is 115 Fed. (2d), 492, that was a rehearing at 117 Fed. (2d) —the court there

said:

"The object of the statute providing for admissibility as evidence in any court of the United States of a memoran-

dum or record of any act, transaction, occurrence. 1624 or event made in the regular course of business was

to do away with technical rulings which excluded records ordinarily used in business transactions, when not formally identified by the makers".

Then I would call your Honors' attention to Wigmore,

Sec. 2160, Third Edition, 1940, in which he says:

"Documents produced from Private Custody: (1) opponent producing on Notice; (2) endorsements on Negotiable Instruments; (3) Sundry Documents. During the vogue of the attesting-witness rule, an unsound doctrine obtained a partial vogue that an opponent producing a document from his possession on notice admitted its genuineness, so that the attester need not be called. Obviously the mere possession of any document, especially one purporting to be signed by a third person, should not be treated as an admission of genuineness. But, apart from any principle of Admissions, and looking only at the circumstantial value of the party's possession, may it not fairly be said that a person's possession of documents purporting to be made by himself (in this case by Certain-teed) and, particularly, of documents used and acted on by him in the ordinary conduct of his business, is sufficient evidence of their genuineness to justify their reception? This rule would be justified, not only by the inference thus drawn from daily experience, but also by the fact that the burden of disproof of genuineness, if it is actually disputed, can the more

readily be placed in such a case on the party him-

1625 self."

Wigmore cites some annotations to that. One

case, an Oregon case, was a case where letters were evidenced by carbon copies. They were found in the corporate offices of the defendant, and that was held alone to be sufficient to authenticate them under this statute. It wasn't under this statute, but that was at common law. That is

147 Oregon, 1; 31 Pacific (2d) 754.

So that upon that ground I believe we have shown that this is a document concerning a conference, that it was taken from the files of the Certain-teed Products Company, in fact it lay in the files of the Certain-teed Products Company apparently from 1928 until 1940; and that it recites that the leading officers of the management were present, and within the statute it seems to us that it is sufficiently authenticated and it goes simply to a question of weight, whether or not it is correct.

Justice STEPHENS. Read the statute again, Mr. Stef-

fen, will you please?

Mr. STEFFEN (reading). "In any court of the United States and in any court established by Act of Congress, any writing of record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence or

event, if it shall appear that it was made in the 1626 regular course of any business, and that it was the

regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All of the circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of any kind."

Justice STEPHENS. What is there de hors the instrument, to show that it was made in the regular course of business?

Mr. Steffen. Our first point would be the fact that it was in their file, and taken from their file, and that is sufficient in itself, according to Wigmore.

Justice STEPHENS. To show that it was made in the

regular course of business?

Mr. STEPFEN. I think so, yes.

Justice STEPHENS. Do you wish to be heard further on the question of identification?

Mr. Adams. I wish to say on that point, your Honor, that it would be astonishing to me if Mr. Wigmore or anybody else would say that something is made in the regular course of business simply because it exists. As I have always understood the purpose of this statute, it was to liberalize the rules of evidence with respect to the use of

records made in the regular course of business, but that it in no sense relaxed the requirement that

there be a showing that the record or document was actually made in the regular course of business. There is no such showing here. This is an incidental, isolated paper which counsel is trying to pull himself up by his bootstraps with, by saying that because it exists it is admissible, and then he says that there is something in the memorandum which indicates that it has something to do with this case.

But it is important here to recall that Mr. Brown has testified that he never saw the memorandum before, he has no recollection of the conference, he did not make the memorandum, and he does not know who made it. It seems to me that if we simply say in this case that every document that happens to have been found in the files of any one of these numerous companies is admissible by that fact alone, that we are sweeping aside every rule of evidence.

I would also like to comment with respect to his statement that this was purported to have been made by Certainteed, that there is no such evidence in here. This might

have been made by any one of these lawyers.

Justice STEPHENS. We are of the view that the document is not sufficiently identified even within the statute. We are familiar with that statute but we do not think it is intended that that statute shall relax the rule requiring some showing outside the instrument, that it was made in

the regular course of business and is a memorandum of the character described in the statute. You may

be able to call somebody from the company who may be able to identify it as having been made in the regular course of business. In that event the other relaxations of the general rule would apply. But it is our view that it is presently not sufficiently identified, and we therefore sustain the objection to it upon that ground. If there is a large class of documents of this sort involved, and since the matter has been raised at this time, we will hear you further, Mr. Steffen, on the other question, since both questions have been raised. We are inclined to the view, although we hold our minds open to hear from you on the subject, that the document shows on its face that it is privileged.

It is true that not every communication between counsel and client is privileged, and there may be many discussions between counsel and client of a general nature which are not privileged; but this appears to be, and we have read it carefully, a long statement by agents or officers of the company in the presence of counsel—this witness has said that this man Chaffee was the lawyer for the company; this witness was a vice president and can testify to that—for the purpose of determining what action to take with respect to a proposed license agreement, with respect to the payment of royalties under it, whether or not on all products or on merely the patented products, and whether or not to

continue to make open-edge board, and where; and 29 it ends up with a statement by counsel on the subject. It seems to us that, unless the client waives

the privilege, it is privileged. But we haven't necessarily reached a conclusion on that subject if you wish to argue it further. You need not argue on that now unless you intend to offer a lot of such testimony.

Mr. STEFFEN. There may be a lot of other items that will come up of this sort, and while I take it this is a moot argument, in view of the fact that the exhibit has been excluded, I would like to raise one or two questions to clear

the situation from our viewpoint.

We feel that this memorandum rather clearly, from the Government's angle, is a discussion of the business views involved. The question is whether or not they should take over, or whether or not they should go to the manufacture of the closed-edge board in the Acme plant, and if you will look at the agreement that is a matter upon which the executives of Gertain-teed would have to make the final decision. It does not involve any question of a lawyer's discussion in it, it has to do with sales questions, it has to do with whether they could market an open-edge or a closed-edge board better, and there is nothing to indicate in the document at all that they confided to counsel a professional matter upon which counsel was to advise.

And that is essential, as I understand it, before the attorney-client privilege can be called into ques-

tion.

I have some cases here which your Honor may be quite familiar with.

I will call your attention particularly to the statement in 70 Corpus Juris, 412, at Sec. 554

Justice Jackson (interposing). Corpus Juris Secundum?

Mr. Steffen. No, it is the first.

"In order for a communication to be privileged not only must the relation of attorney and client exist between the parties but the communication must relate to professional matters and must have been made on account of the relation of attorney and client. The mere fact that at the time of the communication the relation of attorney and client existed between the parties does not make it privileged. It may or may not be privileged according to its nature. The privilege does not protect against disclosure every communication which the client may chose to make to his attorney under a pledge of secrecy; it protects only such communications as the client may make, not pending the attorney's professional employment, but in the course of it. That which is privileged is a confidential communication properly intrusted to the attorney in his professional capacity and necessary and proper to enable him to discharge the functions of his office according to the usual practice and discipline. The communication must be made by the client for the purpose of obtaining counsel, advice,

or direction with regard to his legal rights or obli-

1631 gations."

Now one of the leading cases is In re Fisher, 51

Fed. (2) 424, and there Judge Knox said:

There is no privilege with regard to communications made to accountants. The information given to the witness and to the accountants in his employ for the purpose of making financial statements and doing other work characteristically performed by accountants is not privileged, despite the fact that the witness may also have rendered legal advice on the basis of such data."

Then he cites The Matter of Robinson—"where it was held that an attorney for a corporation, who was one of its directors, could not refuse to disclose information about corporate affairs by claiming his professional privilege.

"Furthermore, the privilege accorded to an attorney is the privilege of the client and not of the attorney." " For this reason the attorney cannot claim privilege where the client has already disclosed the substance of a communication. " " Nor can he claim privilege where the communication was made with the understanding that it was to be imparted to third parties."

We have a number of other authorities.

Justice STEPHENS. I think the rules are pretty well settled on the subject. The question really is whether this comes within them.

Mr. STEFFEN. And as I say, at the present mo-1632 ment it is a moot question, but we would like to reserve time, when the time comes, to discuss that in more

Justice Stephens. You may do that. We will hear fur-

ther from you also, Mr. Adams.

Mr. STEFFEN. I would say that the only reference to counsel in this exhibit is in the third paragraph at the bottom of the second page, where Mr. Adkins stated that they could not sign the license agreement, which in itself is rather a minor, nonconfidential type of business. It is not in his professional capacity, I think, in the sense that the . rule contemplates, and if we should introduce it we could

omit that paragraph.

Justice STEPHENS. We will hear from you again if that type of question arises again, and also from you. Mr. Adams. The rule is not, of course, that every communication between counsel and client is privileged. Communications between lawyer and client are not conclusively presumed to be privileged—that is well settled. It must be demonstrated that they are within the privilege, and confidential in character. That rule is well settled.

We will hear from both of you again if it becomes neces-

Thank you.

The objection to this exhibit is sustained because of lack of identification, without prejudice to the right to reoffer it if identification is later supplied.

By Mr. STEFFEN. 1633

Q. I would now like to show you, Mr. Brown, what has been marked Government's Exhibit for identifica-No. 211.

Justice STEPHENS. What is the date of that?

Mr. Steffen. That purports to be a memorandum with the initials "L. R. W.", addressed to Mr. Brown, under date of February 7, 1928.

Justice STEPHENS. What is that number, 211?

Mr. STEFFEN. Exhibit 211.

By Mr. STEFFEN.

Q. And I would ask you if you can identify that as a memorandum which you received, addressed to Mr. Brown?

A. I don't recall the memorandum, and in my opinion it was intended for Mr. George Brown, the president. Q. Who would the initials "L. R. W." refer to?

A. L. R. Walker, vice president.

Q. You say you do not remember having received the memorandum?

A. No, sir, and the last paragraph would indicate it

was not addressed to me.

Q. Do you recall any discussions with Mr. Walker concerning the matter of negotiations with USG upon the license agreement with Beaver?

A. No, sir.

Q. Do you know what his position was upon the matter?

A. I don't remember.

Q. Could you identify this, Mr. Brown, as the form of memorandum which was prepared by officers of Certainteed?

A. No, sir, I could not state that to be a fact.

Q. Are you familiar with the form of memorandum that officers of Certain-teed made from time to time?

A. I don't recall that they had any special form.

Q. Was it usual for officers in your company to sign the memoranda on general questions of policy?

A. I don't remember.

Q. Did you ever make any memoranda concerning meetings and negotiations relative to the license agreements with USG?

A. Yes, sir.

Q. Do you recall whether you signed them or whether they were merely initialed, typewritten?

A. I don't recall. Some maybe I did, and some maybe

I didn't.

Mr. STEFFEN. I would like to offer Exhibit No. 211 and point out to the Court that the memorandum in the first place was taken from the file, which is established by the fact that it was item No. EE-4. It bears the initials "L. R. W." It is addressed to Mr. Brown who the witness says he assumes was Mr. George M. Brown, the president. There was a Mr. George M. Brown who was president. I

also call your attention to the fact that the last para-

1635 graph says:

"As this is a matter of so much importance I recommend that Mr. C. O. Brown and Mr. Blagden go to

Chicago", and so forth.

The memorandum was dated February 7, 1928, and Exhibit No. 209 is a letter written by Mr. C. O. Brown, the witness, in which he states that he will be in Chicago and would like to see Mr. Avery.

1636 Justice STEPHENS. Is 209 in evidence?

Mr. Steffen. 209 has been admitted in evidence, which would seem to be internal connection in addition to the other matters that I have mentioned, to sufficiently identify it.

Justice Stephens. Is there any objection?

Mr. Bromley. Objected to as incompetent, because of

no proper foundation and no sufficient identification.

Justice STEPHENS. We are inclined to the view, in fact we have the view, Mr. Bromley, that this, while close to the line which we have been trying carefully to follow with respect to identification, is probably within it. We have admitted previous exhibits on the basis of their having been taken from the files, without dispute, of the defendant concerned, where there was an initial or other apparent circumstantial identification, and where there was a reference in the exhibit to a previously admitted exhibit or letter which connected the two circumstantially. We think it is getting pretty close to the line, but we do think this is admissible. It will be received.

(The document referred to, marked as Government's Ex-

hibit No. 211, was received in evidence.)

Mr. Adams. May I ask one question about it, Your Honor?

Justice Stephens. You may.

1637

By Mr. ADAMS.

Q. Mr. Brown, there was another Brown in addition to yourself in this company, wasn't there?

A. Yes, sir.

Q. And who was that?

A. D. F. Brown.

Q. And as far as the face of this exhibit is concerned, you don't know whether this memorandum was addressed to him or to George M. Brown, do you?

A. I have no way of knowing.

Justice STEPHENS. We think that wouldn't make any difference, if both of them were members of the Company, Mr. Adams.

I thought there were only two Browns connected with

your company.

Mr. ADAMS. No, there were three. This is the introduction, into the case, of Mr. D. F. Brown, who I will say was the son of Mr. George Brown.

Justice STEPHENS. Thank you.

By Mr. STEFFEN.

Q. What title did Mr. D. F. Brown carry, if any, do you know, Mr. Brown?

A. At one time he carried the title of Assistant to the

President. I don't recall any other titles.

Q. Now I would like to ask you some questions concerning the second paragraph in Exhibit No. 211.

1638 Did you have any information concerning the amount of royalty that would be charged under the Beaver license agreement if you went to the closed-edge basis at your Acme plant?

Justice STEPHENS. Just answer that question yes or no, first. We don't want to get a lot of things into the record here, Mr. Brown, that are speculation. State in the first

place whether you did know it.

Justice JACKSON. And reading that exhibit is not going to do you a bit of good.

The WITNESS. I would say no, according to my memory.

By Mr. STEFFEN.

Q. Did you at any time consider the possible savings that might be effected by using a closed-edge board rather than using the open-edge board, if you remember?

A. No, sir.

Q. Do you recall whether the Beaver license agreement provided that the licensees should respect the resale price in their sale of gypsum board?

Justice Jackson. I don't understand that question, Mr.

Steffen.

1639

Mr. STEFFEN. Perhaps I had better rephrase it.

Justice Jackson. Perhaps I am a little stupid this morning.

Mr. Steffen. Maybe I had better rephrase it.

By Mr. Steffen.

Q. Do you recall whether the Beaver license agreement would require a licensee to respect resale prices?

Mr. Bromley. I object to that as incompetent and as not being the best evidence, the agreement being the best evidence. It speaks for itself, and it has no provision about resale price whatsoever, as Mr. Steffen must know by this time.

Justice STEPHENS. Unless you wish to be heard, we will rule on that. The objection is sustained. The exhibit itself should be consulted on that subject.

By Mr. STEFFEN.

Q. I would like to ask, Mr. Brown, whether or not you

understood that the licensor might fix prices on gypsum board, under the terms of the license?

A. Under the Beaver license?

Q. Or any license.

A. I don't know about the Beaver. When Certain-teed

took it, I knew they could set the price.

Q. Do you know for what period of time the licensor could fix prices under the Certain-teed-USG agreement, the first one?

A. Which one, sir?

Q. Well, perhaps we had better take that up later, Mr. Brown. What I was referring to was the first license agreement, though we haven't developed that as yet.

1640 I think you have testified that you were in charge of sales, Mr. Brown, during the period from 1925 to 1929; is that correct?

A. I was connected with the Sales Department.

Q. And did you have to do with the sale of gypsum board?

A. Yes, sir.

Q. Do you know what other manufacturers there were in the field at that time, '25 to '29, who were manufacturing gypsum board?

A. Do you wish me to name the ones I remember?

Q. Yes, I wish you would.

A. United States Gypsum Company; Ebsary Gypsum Company —

Q. (Interposing.) Do you know when they started making board?

A. No, sir, I do not.

Q. You don't remember?

A. No, sir.

Universal Gypsum; Beaver Products; I am not sure when National started to make board.

Q. Do you remember the Texas Company?

A. Yes.

Q. Niagara, do you remember that company?

A. I remember the company, yes, sir.

Q. Do you remember the Kelly Plasterboard Company?

A. Yes, sir. Q. American?

A. I don't think all of those made board, however, but I am not sure.

Q. Now among those companies which you have named, which ones do you think didn't make board?

A. May I have the question?

Q. You said you weren't sure which ones of those companies were making board. Do you recall which ones weren't making board?

A. I named originally the ones I thought were making

board.

Q. Do you remember which ones were making closededge board? You have named USG-they, of course were; you have named Ebsary. Was Ebsary making a closededge board or open-edge board, as you remember it?

A. I don't remember. Certain-teed is the only one I

would be sure of.

Q. What were they making?

A. Open-edge board.

Q. Do you remember whether they made an open-edge board at their Beaver plants?

A. I think they did make some.

Q. Could you tell us who your principal competitors were? Perhaps I should ask the question—was there competition during this period when you were in charge of sales? 1642

A. Yes. sir.

Q. Was there price competition?

Yes, sir.

Q. Do you remember who your principal competitors

A. The four or five companies I mentioned just a minute

Q. Well, you mentioned first USG-were they a com-

petitor?

A. Yes, sir. Q. Ebsary?

A. Yes, sir. Q. Universal?

A. Yes, sir.

Q. Beaver Products, of course, we will pass over.

National?

A. Yes, sir.

Texas?

Yes, sir.

Q. Niagara?

I don't remember much about them.

Q. Kelly?

The same answer as to Kelly.

Q. American?

1643 A. The same on American.

Q. Now I would like to ask you to remember, if

you can, which of your competitors were selling a closededge board?

A. United States Gypsum and Beaver are the only ones

I can remember.

Q. Do you know what sort of board Universal was making, Mr. Brown?

A. No, sir.
Q. Do you know what sort of board Texas was making?

A. No, sir.

Q. Do you know which companies were licensees of USG during this time, 1927, 1928 and 1929?

A. Beaver is the only one I know.

Justice STEPHENS. The Court will take the noon recess at this time.

(Thereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.)

#### 1644

### AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice Stephens. Proceed.

Thereupon, CLAUDE OLIVER BROWN, the witness on the stand at the time of recess, resumed his testimony as follows:

DIRECT EXAMINATION (Resumed).

Mr. STEFFEN. With reference to Government's Exhibit for Identification No. 210, I would like to ask that the United States Gypsum Company produce the carbon of the letter of January 27, 1928, referred to in the first paragraph of that exhibit; and that Beaver Board or Certainteed produce the original.

Justice Stephens. Proceed.

By Mr. STEFFEN.

Q. Mr. Brown, we were talking, before the recess, about the various companies that were manufacturing board in 1927, 1928 and 1929. I think I should state for your information that there were four licensee companies in 1926 and 1927. Those companies were the Universal, Beaver Board, Texas, and Atlantic. That is, four licensee companies at that time.

Could you tell us whether open edge board sold at' the same or a different price than closed-edge board.

1645 A. It sold at a different price.

Q. What was the differential during 1927 and 1928, approximately, if you remember?

A. I don't know. It was lower than closed-edge board.

Q. Could you give us an approximation of the difference?

A. It might range from \$2 to \$6 a thousand.

- Q. That would be on board, or on lath, or on what?
- A. Board, I have in mind. I don't recall about lath.
- Q. Do you recall whether your company at Acme, which was making an open-edge board, was producing to capacity, or what was their production?

A. I don't remember.

Q. Do you recall whether your company was making a profit on its sale of open-edge board during 1928?

A. I think they made some profit.

Q. Could you be more specific on that?

A. No, sir.

Q. Did they make a profit, would you say, on into 1929,

in the sale of open-edge board?

A. I don't remember on the specific product. The company wasn't making much money at that time, as I remember.

Q. I see.

Now this morning we discussed Government's Exhibit No. 209, which you will recall was your letter to Mr. Avery suggesting a conference. I believe your

Avery suggesting a conference. I believe your 1646 testimony was that you did not at this time go to Chicago; is that correct?

A. Yes, sir.

Q. Do you know whether anyone from your company did go to Chicago to see Mr. Avery after February 20, 1928, or at about this time?

A. I don't recall as to any dates.

Q. Do you recall whether anyone went out to talk over with Mr. Avery the general question of taking over the Beaver Company license, which was mentioned in your letter of February 20?

A. Mr. George Brown made a trip eventually, but the

date I don't recall.

Q. And his trip was to do what?

A. Presumably to work out their difficulties with USG on the Beaver contracts.

Q. And did you discuss that with Mr. Brown upon his return?

A. No. sir.

Q. Did Mr. Brown, to your knowledge, prepare any memorandum or report concerning his trip?

A. I don't remember such a report.

Q. Do you know what the result of the negotiations between Mr. Avery and Mr. Brown was?

A. It eventually, as I recall, resulted in Certainteed taking a license.

1647 Q. Do you know the approximate date of that?

A. No, sir.

Q. In order to get this matter clear, I will show you Government's Exhibit No. 4 at this time. This is to show you the tlate.

Will you examine that, the signatures and the date, and determine whether that is the license agreement that you spoke of when you said they eventually took one out?

A. In my opinion, it is. Q. What was the date?

A. The 22nd day of May. Q. And the year?

A. 1929.

Q. Now we are speaking about the date of February 20, 1928. In other words, there was about a year and 2 months in between those two dates. Could you place any closer the time when Mr. Brown went out to Chicago?

A. No. sir. I don't remember the date.

Mr. STEFFEN. At this time, Your Honor, I should like to introduce in evidence the United States Gypsum Company Admission to Government's Interrogatory, and I will read the paragraph, Paragraph 32, to this effect:

"As presently advised, there were the following meetings: (a) February 29, 1928, Chicago. Present:

Sewell A. Avery, George M. Brown, President of Certain-teed, and Augustus S. Blagden, President, Beaver Products, Inc., the assets of which latter

company had been just purchased by Certain-teed."

Justice STEPHENS. That is the USG's answer, is it?

Mr. STEFFEN. Yes.

It would appear from that, Mr. Brown, that Mr. George M. Brown was in Chicago, talking to Mr. Avery on this matter, on February 29, 1928. Does that refresh your recollection on that matter?

The WITNESS. No, sir; I don't remember about the meeting.

### By Mr. STEFFEN.

'Q. Well now, can you tell us what Mr. Brown's attitude was on or about this date of February 29, when he was in conference with Mr. Avery, concerning taking out a license

agreement to cover your Acme plant?

Mr. Adams. I respectfully object to this question, with respect to its form, it involving an inquiry into somebody else's state of mind. I think if he had a conversation with Mr. George Brown, that he possibly might be permitted to testify to it, provided, however, he can state with reasonable certainty when and where the conference took place, or the conversation took place.

Justice Stephens. Do you wish to be heard?

Mr. Steffen. Yes. I think he is certainly competent to testify as to Mr. Brown's attitude on this matter, and it certainly is relevant and material to show the state of mind of the officers of Certain-teed Products' Corporation at this time concerning what they would do

under the license agreement.

Justice Stephens. Well, we think it is relevant and material, but the Court thinks that the question is improperly phrased in that it calls for a conclusion. Of course, it is not always possible to be exact with respect to the type of inferences that are admissible in evidence and those that are not; but here, when you are on a critical subject which has to do with the attitude and position taken by companies on license agreements, it seems to us that what counsel ought to ask for is the conversation that this man may have had, or the substance and effect of the conversation, reasonably fixing the time and place of it, with Mr. Brown, if he had such a conversation.

Objection sustained.

# By Mr. STEFFEN.

Q. Did you have any conversation with Mr. Brown on or about March 1, 1928, concerning whether the Certainteed Products Corporation would take out a license with USG or not?

A. I don't recall any such conversation.

Q. Were you in a position where you could have talked with Mr. George M. Brown?

A. Well, I was not even an officer at that time.

Q. You signed letters as Assistant to the President? A. That isn't an officer in that company.

Q. But as Assistant to the President, would you not talk

to Mr. Brown and the other officers?

. A. Not necessarily, no, sir.

Would that give you any Q. He was also your uncle. opportunity to talk business matters over with him?

A. That would be a good reason why he wouldn't.

(Laughter.)

· Q. Did you talk with Mr. Whittemore on or about this: time?

A. No, sir.

Q. Did you talk with Mr. Nelson on or about this time, to your recollection?

A. I don't recall any conversations with Mr. Nelson.

Q. Did you talk with Mr. L. R. Walker on or about this

time?

We might have discussed the advisability of having closed-edge board. That would be the only thing I could recall

Q. Well, let's have that discussion?

A. Purely from a sales standpoint,—we felt there was an advantage in the closed-edge board.

Q. What was the advantage? 1651

A. It was a better board.

Q. But from the sales standpoint, what was the advantage?

A. It was more acceptable to the trade.

Q. And did you discuss the matter of the price at which you would sell closed-edge board if you took out a license?

A. No, sir, not as I recall.

Q. If you took out a license, what would be the result as to price?

A. I understand that was set by United States Gyp-

sum Company.

Q. And did you ever discuss that matter with Mr. Walk-

A. I don't recall any such discussion.

Q. Mr. Walker was your superior, was he? A. Yes, sir.

Q. Well now, I will show you Government's Exhibit No.

Justice Jackson (interposing). Is that the item marked X318?

Mr. STEFFEN. That is right.

By Mr. STEFFEN.

(Continuing.) Which purports to be a Memorandum

Regarding the Possibility of Making Plaster Board under the Royalty Basis, by George M. Brown,

President, under date of March 1, 1928, which was one or two days after he had been out to Chicago talking to Mr. Avery.

Mr. ADAMS. May I ask what the purpose of showing this to the witness is?

Mr. Steffen: To ask if the witness has ever seen the

memorandum and can identify it. Mr. ADAMS. Is it proposed to offer this in evidence by this witness?

Mr. Steffen. If this witness can identify it, yes, sir. The WITNESS. I don't remember the memorandum.

By Mr. STEFFEN.

Q. Did you see that memorandum before the Grand Jury, Mr. Brown?

A. I don't remember that, sir.

Q. Do you know who "DS" is, following the name "Geo. M. Brown, President", at the top?

A. I assume that it is the secretary that wrote it.

Q. Do you know what his or her name was?

There was a Miss Stevens that was his secretary. She might have written it.

Q. There was a Miss Stevens who was his secretary?

Yes. Q. Were you familiar with the filing system at

Certain-teed on or about March 1, 1928?

A. No. sir. Q. Do you know what would become of a memorandum of this sort?

A. No. sir. Q. Could you say whether or not this was a usual form of memorandum on matters of this sort? We have already

had two or three. Mr. ADAMS. I submit we haven't had two or three. He previously testified that he didn't know anything about people making memoranda; sometimes they made them and sometimes they didn't, and there wasn't any course of business or policy about them, and he so testified.

Mr. STEFFEN. We have had only one, Your Honor.

By Mr. STEFFEN.

Q. Could you answer the question, Mr. Brown?

A. There was no set system that I knew of.

Q. Could you say whether, from time to time, memo-

randa of this character were made and filed?

A. I would say that they were.

Mr. STEFFEN. I think we will now offer Government's Exhibit 212, and I should like to point out to the Court that George M. Brown is admitted to have been in Chicago on the 29th of February. He reports on the meeting held in Chicago, in this memorandum of March 1, 1928. It

bears the initials "DS", which apparently are the initials of the secretary, Miss Stevens. It was taken

definitely from the files of the Certain-teed Company because of the Item No. X318 which was put on by Mr. Adams or counsel or the Certain-teed people. It appears to be a memorandum of a sort which is made from time to time. It is, therefore, more or less in the regular course of business. Of course, it isn't in the regular course of business like a sales transaction, but in matters of this character there would be reports made, I gather, and they would be put on file.

Justice Stephens. Any objection?

Mr. ADAMS. Yes, we certainly have, Your Honor.

In the first place, there is no statement in here that the meeting took place in Chicago. In the second place, there is no evidence, and the witness has no idea, who prepared this memorandum.

I might ask him -

Mr. Steffen (interposing). I forgot to ask him. I don't think it is material.

# By Mr. ADAMS.

Q. You don't know who prepared this memo, do you?

A. All I know is the signature.

Q. You mean the typed signature,—"Geo. M. Brown"? A. Yes.

Q. But you don't know of your own knowledge whether George M. Brown wrote this or not, is that correct? 1655

A. That is correct.
Q. And you are not familiar with the matters that are contained in it, are you?

A. No, sir.

Mr. ADAMS. I might suggest to the Court further -Justice GARRETT (interposing). May I interject? Assuming that Mr. George M. Brown did write it, what was it for, what relationship has it? There may be subsequent papers that show something, I don't know.

Mr. STEFFEN. We have, of course, additional evidence. But this would be a declaration of a co-conspirator, Mn

George M. Brown; and it would also show, as clearly, I think, as possible, what the state of mind and purpose and intent of the Certain-teed Products Corporation were at this time—both highly relevant and competent matters to produce in evidence.

Mr. ADAMS. May I say this, Your Honor, that there is no evidence here that George M. Brown wrote this memorandum. It says on it, "Geo. M. Brown, President". It

may have been addressed to him.

Justice GARRETT. I realize that, but I said assuming that it was written by him. Of course, I didn't mean to say that it was, at all.

Justice Stephens. The Court thinks that we have heard enough on the subject. We have really discussed

1656 this thoroughly before,

We think the objection should be sustained, not upon the ground that it is irrelevant or immaterial, but on the ground that it has not been identified, even within Section 695. We think the testimony of this witness does not establish that this memorandum was made in the regular course of business.

Objection sustained.

#### By Mr. STEFFEN.

Q. I would like to ask you a question, Mr. Brown, about the Ebsary Company. Were you familiar with its business practices in 1928 and 1929?

A. I knew the company. What do you have reference

to by the word "practices"?

Q. Well, would you regard the Ebsary Company as a

company which might grant rebates, for example?
Mr. Adams. I object to that. I think it is a matter wholly of opinion, and calling for a conclusion on the part of the witness on a state of facts some 12 or 15 years ago.

Justice Stephens. Objection sustained. If he knows what the Ebsary Company did with respect to that matter, he may testify to it. Find out whether he knows.

# By Mr. STEFFEN.

Q. Do you know whether the Ebsary Company was in the habit of granting rebates?

Mr. ADAMS. I object to that. I think he should be required to state the facts with reference to a

Justice Stephens. He can ask a preliminary question, Mr. Adams, as to whether he knows. That can be answered

yes or no. That can be followed up with a more specific question.

Mr. ADAMS. I objected to his asking whether he knows

if it was their habit.

Mr. Steffen. He can still answer that yes or no. Justice Stephens. Do you know, or don't you? The WITNESS. I do not know. Justice Stephens. Very well.

By Mr. STEFFEN.

Q. Do you know of any occasion when the Ebsary Gypsum Company may have granted a secret rebate, or a rebate?

A. I do not.

Q. What was your opinion of the dependability of the

National Gypsum Company?

Mr. ADAMS: I object to that as calling for an opinion and a conclusion; and moreover, on the ground that it is not relevant to any inquiry in this lawsuit under the issues set forth in the complaint.

Mr. STEFFEN. I will answer that, Your Honor, by saying that the witness' opinion is material, because it is necessary to show the state of mind of the company

and of its officers, and it is highly relevant for the reason that one reason for not going into a license agreement might be that certain members who would go in would not be dependable and would not maintain a fixed price. And I want to know whether this witness shared

that opinion.

Justice Stephens. Of course, Mr. Steffen, it depends upon what you mean by the question. If you want this witness' opinion as to whether the National Company was a dependable company, it would seem to the Court that that was not relevant, and also not competent. want it to prove that this witness, as an official of the company, was or was not disposed to deal with the National Company, it may be relevant with respect to his state of mind, but we think that it ought to be shown by asking the particular items of conduct of the National Company which produced his unwillingness to deal with them. are very doubtful whether counsel ought to be allowed to ask whether, in this man's opinion, the National Company was a dependable company. In the first place, he has testified that he wasn't dealing with them, that he had no authority to make these negotiations, and his relationship to the whole thing is so vague that it seems to us not proper.

# Objection sustained.

1659

By Mr. STEFFEN.

Q. Do you recall any communications from the United States Gypsum Company after this time, after March 1, concerning the license agreement, and whether or not you would be permitted to take out a license?

A. No, sir, I don't recall -

Justice STEPHENS (interposing). I am sorry, I didn't hear that question. Will you please read it for Judge Jackson and myself both?

(The question was read by the reporter.)

By Mr. STEFFEN.

Q. I show you now Government's Exhibit No. 213, which purports to be a letter from Mr. Henning, addressed to the Certain-teed Products Company, under date of March 20, 1928, and ask if you are familiar with that letter and can identify Mr. Henning's signature?

Justice Stephens. March 20, 1928?

Mr. STEFFEN. That is right. The WITNESS. The signature, I would say, is Mr. Henning's. I don't recall the letter.

Mr. Steffen. I offer Government's Exhibit No. 213.

Justice Stephens. Any objection, Mr. Bromley? Mr. Bromley. Only the usual one, sir.

Justice STEPHENS. Received in evidence, subject to the reservation with respect to declarations of alleged coconspirators.

1660 (The document referred to, marked as Government's Exhibit No. 213, was received in evidence.)

## By Mr. STEFFEN.

Q. It states in the letter, Mr. Brown, that the Certain-teed Company has "alleged that we refused to grant to you a license under our patents unless you would accept the same extended to 1937" and then further, "that it would not be acceptable to us if you assumed the license agreement as to the properties of The Beaver Products Company \* \* exclusive of your other plants."

Are you familiar with that matter?

A. I don't recall it.

Q. Do you know whether or not your company did allege that they were not to be granted a license covering only the Beaver plants, not including the Acme plant?

A. I don't recall anything of that kind.

Q. Does this letter offer you a license covering Beaver and not covering Acme?

Mr. ADAMS. I object to that. The letter speaks for itself

as to what it offers.

Justice STEPHENS. Objection sustained.

By Mr. STEFFEN.

Q. Do you understand this letter to permit you to take out a license covering Beaver but not covering 1661 Acme?

Mr. ADAMS. The same objection.

Justice STEPHENS. The question is not proper, Mr. Steffen. The letter speaks for itself. What he understands the letter to mean is not competent.

By Mr. STEFFEN.

Q. Did you understand that you could ever have a license from USG covering Beaver and not covering Acme?

Mr. ADAMS. That I object to.

Mr. STEFFEN. That, I think, is in point.

Mr. ADAMS. "Do you understand that you could ever have a license covering Beaver", and so on. What he understood on it from this letter certainly can't be stated in evidence here.

Mr. STEFFEN. I am not construing the letter. I am asking this witness his understanding of whether it was possible for Certain-teed to take out a license covering

Justice Stephens (interposing). Let me shorten it.

Did you have any knowledge on the subject? The WITNESS. I don't know, Your Honor. Justice STEPHENS. That is all.

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 214, purporting to be a letter from Mr. C. O. Brown addressed to the U. S. Gypsum Company, under date of March 23, 1928,

the U.S. Gypsum Company, under date of March 23, 1928, in answer to Mr. Henning's letter of March 20. 1662 Please read that, Mr. Brown, and tell us whether

that is your signature at the end?
Justice STEPHENS. What is the question?

Mr. Steffen. I want him to state whether that is his letter, and whether it is his signature.

The WITNESS. That is my signature.

Mr. Steffen. I offer Government's Exhibit 214. The signature has been identified. It is in reply to a letter of March 20, which has been admitted in evidence.

Justice STEPHENS. Any objection?

Mr. Bromley. Only the usual one, if the Court please. Justice Stephens. Received in evidence, subject to the reservation concerning the declarations of alleged co-conspirators.

(The document referred to, marked as Government's

Exhibit No. 214, was received in evidence.)

### By Mr. STEFFEN.

Q. I would now like to ask some questions concerning your letter, Mr. Brown, by way of further explanation.

In the second paragraph, you say: "We have had objections to your license agreement as we have understood it, and especially for the time covered after the expiration of the Utzman Patent."

What Utzman Patent did you have in mind there, do you

know?

A. As I remember it, the Utzman Patent was the basic, original patent.

Q. Covering what?

A. Covering closed-edge board.

Q. Do you know when that expired?

A. Not the exact date, no, sir.

Q. Well, the exact date is August 6, 1929.

Now your letter says that you had some objections to the time the license would run on and after August 6, 1929. What were your objections?

A. I assume they were from the people in the organ-

ization.

Q. All right. What were they?

A. They didn't want the license to run after the Utzman patent expired, presumably.

Q. Why?

Justice Stephens. Are you answering from your own knowledge?

The WITNESS. On opinion, Your Honor, only.

Mr. Bromley. I move to strike the answer out, then, if Your Honor please.

Justice STEPHENS. It may go out.

## By Mr. STEFFEN.

Q. We want, Mr. Brown, your recollection of what the reasons were, if you have any recollection. Please 1664 do not answer on opinion at all. Do you have any recollection of what the reasons were why you were objecting to the license agreement on and after the expiration of the basic Utzman Patent?

A. Well, it is my personal opinion that this letter was written by counsel, and I signed it, and I have no ideas on it, really, at this time.

Q. Do you have any ideas on the situation, on the agreement, concerning the possibility of controlling prices

on and after August 6, 1929?

Mr. ADAMS. I object on the grounds that whatever ideas he may have had on the subject are immaterial. He wasn't

even an officer of the company at this time.

Justice STEPHENS. I am inclined to disagree with you on that, Mr. Adams: The charge of the Government here is that there was an illegal agreement on price fixing. This man was the sales manager of the company, an official of the company. The question is perhaps somewhat generally phrased, but it is a preliminary question. He can answer it yes or no, and then it can be pursued further.

The WITNESS. Please state the question again.

(The question was read by the reporter.)

Justice STEPHENS. That is, after the expiration of the Utzman Patent.

1665 The WITNESS. No, sir.

Justice STEPHENS. His answer is no.

By Mr. STEFFEN.

Q. Do you know whether or not there was a possibility of maintaining prices after August 6, 1929, under the agreement?

A. It is my memory that there was not.

Q. Could you say whether or not that had a bearing upon the objections raised by officers of Certain teed to taking a license?

A. I couldn't say.

Q. I want to refer you now to the next to the last paragraph on the second page of Exhibit 214, beginning: "In addition to the above matters", and so on. Please read that, and I will ask you some questions on that.

Now what, Mr. Brown, do you mean by the expression, "price to lineyard companies". You were in the

Sales Department, I think you stated.

A. I don't remember.

Q. What is a "lineyard 'company"?

A. It is a string of yards owned by one central capital.

Q. And what was the Certain-teed practice in selling lineyard companies, do you remember?

Justice Stephens. What did he say a lineyard company was?

The WITNESS. A string of yards owned by one central capital.

By Mr. STEFFEN.

Q. Were they all along one line? Or how did you get the term "lineyards"?

A. The same as chain stores was what they really

were.

Q. Were they on a rail line?

A. Sometimes they were.

Q. All right. What was the Certain-teed practice in selling lineyard companies, as you used the term?

A. We sold them at the same price, as I remember, as

we did to dealers.

Q. Now take the next sentence: "We also understand that you perhaps make your lowest price to some contractors." What was the Certain-teed's practice with regard to sales to contractors?

A. We didn't sell contractors.

Q. Your next sentence indicates that you sold dealers and distributors, is that correct?

A. To my memory, yes.

Q. And in selling distributors, how did you sell them, on a commission basis?

A. Are you speaking of gypsum products or some of the

other products made by the company?

Q. I am trying to find out what you meant by this paragraph in your letter, Mr. Brown. What did 1667 you mean by it?

A. Well, we never had distributors, as I recall

it, in gypsum.

Q. Note your sentence. You are talking about a gypsum license, this letter has to do with a gypsum license

agreement.

In your next to the last paragraph, you said, "We could hardly work well under such a plan as we do business entirely through dealers and distributors. Where a line can be suitably handled by a distributor we like to give our distributor a commission for handling carloads or less." Now is that correct?

A. We had such a policy in roofing. I don't recall such

a policy in gypsum.

Q. Let me have what your policy was with regard to roofing. What was your policy with regard to distributors

and dealers in the sale of roofing?

Mr. Bromley. I object to it as immaterial.

Justice Stephens. What do you claim for that, Mr.

Steffen? There is no issue in this case about roofing.

Mr. STEFFEN. I agree with that. I want to know the policy, though, to determine what their sales organization was, what their distribution was. It is a preliminary question.

Justice Stephens. With that understanding, the objection is overruled. If you wish to bring out what their general sales system was, and then ask whether or not it was applied to gypsum products, you may do that.

Mr. STEFFEN. That is what I have in mind.

The WITNESS. In roofing we had less-than-carload prices, carload prices to carload buyers and distributors, as we termed them, or jobbers, both, at a discount from carload prices.

#### By Mr. STEFFEN.

Q. How wide a coverage over the United States did you have in your roofing business?

A. The entire country.

Q. Did you carry that practice, as you recall it, over to your gypsum business?

A. No, sir, it is my memory that we did not.

Q. I want to show you what purports to be an audit report of Certain-teed Products Corporation, and particularly page 11 of that, and ask you if you can identify it as an audit report, whatever that means, and state whether you ever saw it before?

Justice STEPHENS. Is this to be identified as an exhibit?

Mr. Steffen. Just for the purposes of —

Justice Stephens (interposing). Refreshing recollection?

Mr. STEFFEN. Yes.

Justice Stephens. It need not be marked, then, unless it is to be later introduced.

Mr. ADAMS. What is the date of that? The WITNESS. 1930 to 1931.

## By Mr. STEFFEN.

Q. What is an audit report, Mr. Brown?

A. As I remember, at one time we made our wholesal-

Justice STEPHENS (interposing). Just a moment, Mr. Brown. Answer the question that is being asked you.

